

**REPORTS OF
INCOME TAX CASES
VOL. II**

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INCOME TAX CASES
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Hon'ble Shri Justice B. MALIK, M.A., LL.B.
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VOL. II

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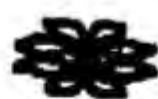
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REPORTS
OF
INCOME TAX CASES

DECIDED IN
THE HIGH COURTS OF JUDICATURE AND CHIEF COURTS
IN BRITISH INDIA, MYSORE AND TRAVANCORE

EDITED BY
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INCOME TAX CASES.

VOL. II

[105] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Walsh, K. C., Acting Chief Justice, and Mr. Justice Dalal.

[28th July 1924.]

In the matter of Messrs. Lachhman Das Narain Das of Cawnpore ... Assessee.

Income-tax Act (XI of 1922) Secs. 23 and 37—Notice to assessee under Sec. 23 (2)—Income-tax Officer not satisfied with assessee's evidence—Officer's power to call evidence himself—Not restricted to that produced by assessee—Sec. 37, powers under, not taken away by Sec. 23 (3).

Where an Income-tax Officer not satisfied with the assessee's return issued a notice under Sec. 23 (2) to produce evidence in support thereof and after weighing all the evidence, direct and indirect, assessed him under Sec. 23 (3).

Held, that the Income-tax Officer was not confined to hear evidence only of witnesses produced by the assessee and that his powers under Sec. 37 to call for and hear evidence were not taken away when acting under Sec. 23 (3).

Per Walsh Acg. C. J.—The 'other evidence' which the Income-tax Officer may require on specified points under Sec. 23 (3) is evidence which he may require from the assessee and of which he may give him notice, specifying the points and requiring its production.

Case [Miscellaneous Case No. 245 of 1924] submitted by the Commissioner of Income-tax, United Provinces, as per his letter No. 731 of 1924, dated 18th July, 1924.

JUDGMENT.

WALSH Acg. C. J.—We accept the statement of the Income-tax Officer as being really the statement of the case on which our opinion is invited. He tells us that he was not satisfied within the meaning of sub-section (1) section 23 with the assessee's return, and that he therefore issued a notice to them under sub-section (2) and fixed the date for the hearing, fully appreciating that it was a judicial proceeding in which he could summon independent evidence if he wanted it, or obtain information for himself from such materials as the assessee chose to produce on the appointed day. The assessee and their representatives attended with their books and the Income-tax Officer told them that the wastage which they were claiming to deduct from their gross returns was more than it ought to be, and more than it was in their other mill, or in previous years in this mill. It is obvious that if a person has once already been assessed in respect of the profits of a particular business, and the profits suddenly show a decrease resulting from the same bulk of material, something has happened to create a diminution of the profits ; in that respect the onus is upon the assessee not as a matter of law, but as a matter of practice and common sense. If a man is receiving so much a year rental from house property, and he returns a smaller amount and explains the falling off by the fact that three houses have been burnt down and therefore could not be let to any tenant, the Income-tax Officer would naturally require him to satisfy him of that fact. The Income-tax Officer therefore rightly called upon the assessee for an explanation of this unusual wastage. He

summoned nobody as a witness and examined nobody, either secretly or openly, who was not tendered on behalf of the assessee, and no suggestion that he had done so was put to him when he appeared before us. The assessee's first answer when asked for their explanation was that in this mill the material was of inferior quality. The Income-tax Officer refused to accept this, giving as his reason that he knew from the evidence of their books that they bought in bulk material of the same quality for both mills, and on that (to quote his exact words) "they kept quiet," which, as a question of fact, justifies the inference that they were not prepared to dispute the statement which he had made. He thereupon assessed them, disallowing what one may call the excess or abnormal or unusual wastage which their return for that year had put forward. An appeal was brought and they objected before the appellate court that they had no proper opportunity of proving the percentage of wastage which they claimed. That was rather an exaggerated way of stating what had happened in the Court below; but the Assistant Commissioner of Income-tax, regarding the assessee as entitled to ordinary justice and the full hearing, which every litigant has a right to, sent the case back to the Income-tax Officer to give the assessee the further opportunity which they desired. What precise opportunity they had been deprived of does not appear, but in fact a re-hearing took place before the Income-tax Officer. On that occasion they produced oral evidence including an expert, on whom they greatly relied, and generally directed their evidence, as they were entitled to do, to showing that in this mill wastage was high and the percentage claimed was justified. The Income-tax Officer, knowing that in their other mill they kept a daily stock book by which the wastage could be roughly checked, although owing to the moderation of their claim on that mill he had never to check it from this stock book, asked orally, without issuing any notice, for their daily stock book. Here again he threw the onus on to them, and they accepted it, by agreeing that they did keep daily records (which the majority of manufacturers enter in stock books) but that these had been kept on sheets and destroyed, and all that could be then produced was a book, or books, which contained a general total at the end of the year, or of some other period. In the view of the Income-tax Officer, both at the first hearing and at the second hearing; after he had been directed by his superior officer to give the assessee a further and better opportunity, they had failed to explain what was the cause of this excessive and abnormal waste. He is the sole judge of fact subject to appeal. Whether he is right or wrong has nothing to do with us. His duty was to take into account the claim, the nature of the evidence by which the assessee sought to establish that claim, which he evidently thought, as he was entitled to do, extremely shadowy, and also to take into account the failure of the expert, and other witnesses to explain this abnormality without self-contradiction, and thinking possibly that if an expert like cannot explain a phenomenon nobody can, and that if an expert breaks down it makes things worse than if he had never been called at all, and that this phenomenon was a new phenomenon in this particular year in this particular mill, and that it did not exist in the other mill of the assessee; weighing all these various facts in the scale, he came to the conclusion that the fair thing to do was to assess them at the figure which he ultimately decided. He did not in fact require them by any notice in writing to produce further evidence on specified points and he did not in fact regard them as being in default so as to enable him to work sub-section (4), and he assessed them, after weighing all the evidence direct and indirect, under section 23 (3). The above statement of facts though importing, as it necessarily must, the adverse view which the Income-tax Officer took of the assessee's returns and his conduct and his evidence, sets out accurately and impartially the precise position when the case reached ultimately the Income-tax Commissioner. The result of such statement is to show that when the case reached the Income-tax Commissioner there was no objection in law which the assessee could legitimately raise, either by way of omission or commission on the part of the Income-tax Officer,

in the proceedings taken by him for ascertaining in fact the fair assessment for which the assessee was liable. I therefore note, as I began, that there is no question of law arising in this case. The application must be dismissed and the assessment must stand, and the assessee must pay the costs of these proceedings.

* * * * *

For my own part I have no doubt, and I am confirmed by my examination of the other provisions of the Act, that the other evidence which the Income-tax Officer may require on specified points, under sub-section 3 of section 23, is evidence which he may require from the assessee and of which he may give him notice, specifying the points and requiring its production. It seems to me that this interpretation enables the machinery to work smoothly and naturally, and any other interpretation works difficulty. There is no doubt that the enquiry contemplated by section 23 is an enquiry such as that which the appellate court under section 31 may direct the Income-tax Officer to hold, or may himself make during the hearing of the appeal. It is deemed to be a judicial proceeding, and the Income-tax Officer has the same power as a court under the Civil Procedure Code when trying a suit to enforce the attendance of any person and to compel him to give evidence on oath, to compel the production of witnesses and of documents, and to examine witnesses on commission. So that he has all the powers of a Judge in a suit, so far as concern witnesses and documents. This gives him ample facilities for securing information and guidance from rivals in the trade of the assessee, or experts, or past employees, or managers, acquainted either with the particular business of the assessee, or the class of business in the neighbourhood—and no further provision is required in any other part of the Act to vest that power in him. Section 37 is comprehensive and adequate. If sub-section 3 of section 23 gave power to the Income-tax Officer to summon further evidence himself it would be tautologous. It would be merely repeating, in inconvincing and inadequate form, what is expressly provided by section 37. In my view the matter is simple and clear. When the day is appointed, and the notice requiring the assessee to attend and produce evidence and so forth at the enquiry has been complied with, up to that point, there has been no default under sub-section (2). If the assessee makes default under sub-section (2) by failing to attend or failing to produce evidence, then undoubtedly the Income-tax Officer may, and indeed has no option but to, do his best under sub-section (4). But in this imperfect world especially with business difficult to understand for any one who has not been specially trained, occasions must often arise when the evidence produced before a tribunal falls short of giving the Income-tax Officer full and complete satisfaction. In this case, for example, the assessee might have said "the wastage is abnormal. I admit it. The fact is that our machinery is worn out. It has given great trouble this year, and partly on that account the wastage has been excessive and our profits much diminished." The obvious course for the Income-tax Officer would be to say "I was not aware of that, and if you satisfy me on that point I shall be prepared to accept your claim of wastage, but before I do that I require you to produce further evidence about the machinery." He may then adjourn the enquiry, fix a fresh date, and in order to prevent mistake require by a fresh notice the assessee to produce other evidence on the specified point, namely on the defect which had appeared in the machinery, on such adjourned date. As my brother pointed out during the argument, sub-section (2) does not confine the Income-tax Officer to one notice, and such further notice, if given would become a notice under sub-section (2). The evidence, if produced, would be other evidence such as the Income-tax Officer has required on specified points, and having obtained it he can then assess under sub-section (3). If the assessee chooses not to produce further evidence on those specified points, then the Income-tax Officer is thrown back on to sub-section (4), just as he is if the assessee has failed to produce any evidence in the first instance, and this view, which seems to me to work, as I have already said, quite

easily and to do justice to all parties, derives confirmation from the fact that an order under sub-section (4) of section 23 is unappealable ; in other words, an assessee who is so obstinate, or fraudulent, that he will not assist the Income-tax Officer by removing these difficulties and tendering further evidence on specified points, is not only penalised at possibly a figure higher than the true figure, but is also deprived of the right of appeal, which is given to those who try their best even though the tribunal does not accept their views. However, these observations do not really arise, inasmuch as in our view no question of law on the facts stated is open for us to decide.

* * * * *

DALAL J.—In my opinion no question of law arises in this case, and we are not required to pronounce any decision under section 66. The Income-tax Officer made an assessment under section 23 (3) of the Income-tax Act. Both the applicant and the Income-tax Commissioner have submitted statements to this court. They appear to be labouring under the mistake of reading this clause of section 23 dissociated with the rest of the Act. The applicant desires us to hold that the Income-tax Officer could hear evidence only of witnesses produced by him, while the Income-tax Commissioner expresses alarm in case this Court held that by the word 'require' in this clause is meant 'require from the assessee.' The Commissioner enquires how a fair assessment is to be made if the Income-tax Officer is confined to hear evidence produced by the assessee only and not any other evidence. This clause however is to be read with the rest of the Act, and it does not take away the power of the Income-tax Officer to call for and hear evidence under the powers he has under section 37 of the Act. The only difference between clause (3) and clause (4) is that in cases falling under clause (3) he is to arrive at an assessment to the best of his judgment on the evidence before him, while under clause (4) he is to decide in the absence of evidence. We have examined the Income-tax Officer and read his judgment and the judgment of the Income-tax Commissioner. Both officers have arrived at a finding on proper and legal evidence, and it cannot be said that those findings are based on mere conjectures without any evidence to support them. Under the circumstances there is no question of law before the Court.

I agree with the order proposed by his Lordship.

[106] IN THE HIGH COURT OF JUDICATURE AT PATNA.

.. Before Mr. Justice Ross and Mr. Justice Kulwant Sahay.

[5th and 13th January 1925.]

Jagarnath Therani

v.

Commissioner of Income-tax, Bihar and Orissa

... Assessee*.

... Referring Officer..

Income-tax Act (XI of 1922) Secs. 10, 30, 31 and 34—Appeal against assessment to Assistant Commissioner—Jurisdiction to assess new sources of income—Boarding and conveyance allowances of servants and sums embezzled by employee—If deductible.

On an appeal against an assessment under Sec. 31 of the Income-tax Act, the Assistant Commissioner of Income-tax has no power to enhance the assessment by assessing new sources of income, outside the subject-matter of the assessment appealed against and properly assessable by the Income-tax Officer having jurisdiction over the same.

A sum of money embezzled by the *gomashta* of the assessee in the ordinary course of business is not a loss in the nature of capital expenditure but one incidental to the conduct of the business, and as such can be deducted in the computation of the assessee's taxable income.

Expenditure incurred by an assessee in respect of boarding (*basa-kharach*) and conveyance (*bidagri*) allowances to his employees with a view to retain their services for the benefit of the business and to increase their efficiency can be deducted in the computation of assessable income, as incurred solely for the purpose of earning profits or gains.

* (1925) I. L. R. 4 Pat. 385; 6 P. L. T. 166; A. I. R. (1925) Pat. 408; 86 Ind. Cas. 777.

Case [Miscellaneous Judicial Case Nos. 64 and 66 of 1924] referred for the decision of the High Court by the Commissioner of Income-tax, Bihar and Orissa.

CASE.

19th May, 1924. 1. The question for determination by the High Court is whether an Assistant Commissioner of Income-tax, when hearing an appeal under sections 30 and 31 of the Indian Income-tax Act, can assess a source of income which was not assessed at all by the Income-tax Officer.

2. The facts are as follows : The assessee, Babu Jagarnath Thirani, filed a return under section 22 of the Act showing his income in the district of Purnea only. The Income-tax Officer assessed him on the income in that district and after completing that assessment began to take steps to assess also the assessee's income in Jalpaiguri and Calcutta of which he was previously unaware. Meanwhile the assessee filed an appeal and the Assistant Commissioner in his order assessed the appellant on his total income in Calcutta, Purnea and Jalpaiguri districts.

3. The assessee contends that the word "enhance" in section 31 covers only the increasing of the original assessment and not the inclusion of other sources of income not assessed at all in the order appealed against.

4. In my opinion, the wording of section 31 is sufficiently wide to cover the order of the Assistant Commissioner. Though it is not stated in so many words, that the appellate authority has all the powers of assessment conferred on an Income-tax Officer, this is clearly the intention of the section, the words "confirm, reduce, enhance and annul" naturally meaning any possible order that could be passed in modification of the original assessment order. It would be altogether anomalous if the Assistant Commissioner had power to enhance an assessment on one source of income and yet had no power to include any income which had not been assessed previously. In effect, to enhance means to include some income which had escaped and the fact that the income which escaped occurred in a different district is immaterial.

The assessee thereafter moved the High Court for the reasons stated in the following

ORDER.

DAWSON MILLER C. J. AND FOSTER J.—This is an application under section 66 (3) of the Indian Income-tax Act of 1922, asking us to order the Commissioner of Income-tax to state a case for the opinion of the Court with regard to three points. A case has been stated in respect of the petitioner's income, but it did not include the three points which we are now asked to order the Commissioner of Income-tax to deal with. The first is whether a sum of Rs. 25,000 embezzled by the petitioner's *gomshita* in the ordinary course of business may be deducted from the assessable income. There is apparently some authority in favour of the proposition contended for by the applicant, but it seems to be a question of some doubt.

The second point is whether a sum of Rs. 2,939 paid under the name of *basakharach* to the petitioner's staff in Calcutta should also be deducted from the assessable income either as expenditure incurred as salary for the purpose of earning profits or for some other reason and, thirdly, whether a sum of Rs. 361 given to the servants for good service under the name of *bidagri* is also a fit subject for deduction. I think sufficient cause has been shown why we should order the Income-tax Commissioner to state the case on these three points.

The application will be granted as prayed in the petition.

SUPPLEMENTAL CASE.

The High Court has called for a reference to itself on three points. The first is whether a sum of Rs. 25,000 embezzled by the *gomashta* of the assessee can be deducted from the assessable income. The assessee apparently contends that this was a loss in the ordinary course of business, and is, therefore, deductible. The exact circumstances in which the embezzlement took place have not been proved, but it appears that the *gomashta* was taking some money to pay to a creditor of the assessee and embezzled it. He was prosecuted criminally and acquitted, and his defence was that he was robbed of the money.

In my opinion it was not a permissible business expense whether it was lost by robbery or by embezzlement. The only provision under which it can possibly be made to come is clause (ix) (2) of section 10 "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making profits and gains." In the first place, there is a difference between a loss through accident or negligence and between expenditure deliberately incurred, and when the law speaks of an expenditure incurred for a definite purpose of earning profits it cannot be held to have intended to include also what may be called accidental losses. If the sum of Rs. 25,000 had been deposited in a bank which stopped payment, its nature as a capital loss would be clear and the fact that it was lost either by embezzlement or by robbery does not alter the fact that this was a loss of a capital nature and therefore not allowable.

The second and third points are whether expenditure called *basa-kharach* and *bidagri* are admissible allowances. No evidence has been offered as to the exact nature of these expenses but it appears that *basa-kharach* is the boarding expenses of servants and *bidagri* the payment to a servant for his expenses incurred in going to his home from his place of employment and back again. Such payments appear to me to be in the nature of voluntary gifts or allowances to the servants in addition to their salaries. There is no evidence that such payments are regarded by custom as part of the salaries and, in the absence of such evidence, these payments can only be treated as voluntary gifts over and above the salary and consequently not deductible.

K. P. Jayaswal, Rai Guru Saran Prasad and Anand Prasad, for the assessee.

Lachmi Narayan Singh, for the Crown.

JUDGMENT.

ROSS, J.—Babu Jagarnath Therani carried on business at Kishanganj in the district of Purnea and had branches in Calcutta and Jalpaiguri. He used to make returns of his income in all three places and the income-tax authorities in Calcutta and Jalpaiguri reported their findings to the Income-tax Officer at Purnea who then combined the figures and made an assessment to income-tax. In the year under consideration, 1922-23, the Income-tax Officer at Purnea made the assessment without waiting for the reports from Calcutta and Jalpaiguri. It appears from the order of the Assistant Commissioner of Income-tax that after making his assessment he noted that assessment would be made on receipt of the reports from the income-tax authorities at Calcutta and Jalpaiguri as heretofore.

The assessee appealed against the assessment to the Assistant Commissioner, who, while reducing the assessment on the business at Purnea, enhanced the assessment as a whole by including the income derived from the branch businesses in Calcutta and Jalpaiguri. Three items were included in arriving at this enhanced sum; viz., a sum of Rs. 25,000 which had been embezzled by a *gomashta* in Calcutta, a sum which was excluded from the assessment by the Calcutta authorities, and two sums of Rs. 2,939 and Rs. 361 on account of *basa-kharach* and *bidagri* respectively which had also been excluded in Calcutta.

The Commissioner of Income-tax has stated a case to this Court on four points: (1) whether an Assistant Commissioner of Income-tax when hearing an appeal under sections 30 and 31 of the Indian Income-tax Act can assess a source of income which was not assessed at all by the Income-tax Officer; (2) whether the sum of Rs. 25,000 embezzled by the *gomashta* of the assessee can be deducted from the assessable income; (3) whether the expenditure called *basa-kharach* is an admissible allowance; and (4) whether *bidagri* is an admissible allowance. The case on the last three points was stated by the Commissioner under the directions of this Court on the application of the assessee.

I shall deal first with the last three points as they are of minor importance. Under the provisions of section 10 of the Act, tax is payable by an assessee under the head "Business" in respect of profits or gains of any business carried on by him; and, in computing such profits or gain allowance is to be made *inter alia* in respect of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. The practice in England seems to be well-settled that sums embezzled are excluded from assessment; see Sanders' Income-tax and Super-tax, Second Edition, page 191, "Loss from embezzlement is deductible"; Murray and Carter's Guide to Income-Tax Practice, Ninth Edition, page 263, "A loss by reason of embezzlement by an employee used to be looked upon as a loss by stratagem, and not one connected with, or arising out of trade, and it used to be said that the amount could not be deducted. Such a loss, however, is now for income-tax purposes deemed an expense of the year in which it is written off in the books"; and Snelling's Dictionary of Income-Tax and Super-Tax Practice, Fifth Edition, page 231, "If a loss by embezzlement can be said to be necessarily incurred in carrying on the trade it is allowable as deduction from profits. In an ordinary case it springs directly from the necessity of deputing certain duties to an employee, and should therefore be allowed." In my opinion, this was not a loss in the nature of capital expenditure but was a loss incidental to the conduct of the business and allowance should be made on this account.

Basa-kharach is stated by the Commissioner of Income-tax to be the boarding expenses of servants, and *bidagri* to be payment to a servant of his expenses incurred in going to his home from the place of employment and back again. These do not seem to me to be in any sense gratuities and it cannot be assumed that there is any charitable element in these payments. These payments are apparently made to servants in order to retain their services for the benefit of the business and to increase their efficiency. In my opinion these payments are made solely for the purpose of earning profits or gains and allowance should be made on account of these sums.

With regard to the principal question, the learned Counsel for the assessee contends that the jurisdiction to assess income-tax upon the business in Calcutta and Jalpaiguri was exercisable by the Income-tax Officer, and the passage quoted from the judgment of the Assistant Commissioner shows that this jurisdiction had been reserved by the Income-tax Officer to himself and that he intended to exercise it. It would appear from the provisions of section 64 that as Purnea is the principal place of business, the assessment should be made by the Income-tax Officer of that district, the authorities in Calcutta and Jalpaiguri reporting to him. It is argued that the so-called enhancement made by the Assistant Commissioner on appeal is illegal on three grounds:—(1) Section 34 expressly provides for the assessment of sources of income that have escaped assessment by the Income-tax Officer; and, where there is an express provision of law applicable to the circumstances of the case, that procedure ought to have been followed; (2) by the procedure adopted by the Assistant Commissioner in assessing on appeal the income from the business at Jalpaiguri and Calcutta the assessee has lost the right of appeal on questions of fact relating to

these sources of income; (3) by section 31 the Assistant Commissioner in disposing of an appeal may, in the case of an order of assessment, confirm, reduce, enhance or annul the assessment. It is contended that "the assessment" means the assessment made by the Income-tax Officer which itself under section 23 is based upon a return; but, in the present case, there was no such assessment so far as the businesses in Jalpauri and Calcutta were concerned and, consequently, the so-called enhancement made by adding these new sources of income was not an enhancement of the assessment made by the Income-tax Officer.

In reply to these arguments the learned Government Pleader contended that the terms of section 31 (3) (a) are general and give power without qualification to enhance the assessment. Now this section relating to appeals is enacted for the benefit of the subject and also, to the limited extent therein stated, for the benefit of the Crown. But the subject-matter of the appeal is the assessment and the scope of the appeal must in my opinion be limited by the subject-matter. The appellate authority has no power to travel beyond the subject-matter of the assessment, and, for all the reasons advanced by the appellant, is in my opinion not entitled to assess new sources of income. To do so would not in reality be enhancing the assessment to the old, the subject-matter being different.

I would therefore answer the points stated by the Commissioner of Income-tax in the manner indicated above. The petitioner is entitled to his costs. Hearing fee three gold mohurs.

KULWANT SAHAY, J.:—I agree.

25th January. ROSS AND KULWANT SAHAY JJ.—The petitioner is entitled to the cost of the printing of the paper books and to the refund of the deposit which he made before the Commissioner of Income-tax.

[107] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

[16th January 1925.]

Commissioner of Income-tax, Bombay

...

Referring Officer.

v.

Sir Purshottamdas Thakordas

...

Assessee.*

Income-tax Act (XI of 1922) Sec. 4 (3) (vii)—Exemption from assessment—Receipts of a casual and non-recurring nature.

A remuneration earned by a cotton merchant, who is appointed under a power of attorney to realise the cotton which another merchant had purchased, is "receipts arising from business," and is liable to be assessed to income-tax.

The phrase "receipts arising from business," as used in Sec. 4 (3) (vii) of the Income-tax Act 1922, is not confined to receipts arising from a business continuously carried on during the year. It would include receipts even from a single adventure in business.

Civil Reference No. 19 of 1924, made by J. B. Vachha, Commissioner of Income-tax, Bombay Presidency, under section 66 (2) of the Income-tax Act, XI of 1922.

The assessee, who was a cotton merchant, in making his return of income for the purposes of assessment for the year 1923-24, while declaring his income from all sources, added the following note:—

* (1925) 27 Bom. L. R. 478; A. I. R. (1925) Bom. 318; 87 Ind. Cas. 706.

"Besides this I received during Samvat year 1978, Rs. 1,88,750 as remuneration for winding up the estate of Umar Sobhani which being an extraordinary source of income is not liable to taxation."

The said remuneration was earned under the following circumstances. In about the year 1922, the firm of Umar Sobhani in its endeavour to corner the cotton market, was compelled to make extensive purchases of cotton to keep up prices. However in a short time it became known to the creditors of the firm and the market in general, that the firm was not in a position to finance the huge purchases made and that its failure was imminent and likely to bring about a crisis in the market if all its purchases were thrown on it. The firm and its creditors, therefore, looked for some one who would command the confidence of the market, of themselves, and of all concerned in the crisis. The assessee appeared to be the right person to all of them and so was selected for the purpose. He was given a power of attorney by the firm and acting under that power, in about nine months' time, he settled the whole affair. The work he performed included the realisation of a huge stock of cotton exceeding a hundred thousand bales belonging to the firm which was in the hands of various "muccadums" and commission agents who had made large advances against the cotton. The sale proceeds of the cotton amounted to about rupees one crore and sixty-three lacs. These were duly realised by the assessee and distributed amongst the creditors. For doing the above work, he was paid Rs. 1,88,750.

The Income-tax Officer did not except the said amount from assessment, and subjected it to tax. Thereupon an appeal was lodged before the Assistant Commissioner of Income-tax who held that this item was rightly taxed. Eventually the Commissioner, on being moved, referred the following question to the High Court, under S. 66 (2) of the Indian Income-tax Act, 1922:—

"Whether the sum of Rs. 1,88,750, included in the assessment for the year 1923-24 does not fall in the class of income referred to in Sec. 4, sub-section (3) (vii) of Indian Income-tax Act, 1922, and is therefore exempt from taxation under the said Act?"

The Commissioner was of opinion that the amount in question was not exempt from assessment to income-tax, for the following reasons:—

Section 4 (3) (vii) of the Act under which exemption is claimed in this case is as under:—

"4 (3). This Act shall not apply to the following classes of income,—

(vii) Any receipts not being receipts arising from business or the exercise of a profession, vocation, or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

Receipts which are to be exempted under this sub-section must be (1) receipts not arising from business or the exercise of a profession, vocation or occupation and (2) receipts of a casual and non-recurring nature. Unless all these conditions are satisfied an exemption cannot be allowed, i. e., receipts arising from a business even though casual and non-recurring will be liable and receipts though not arising from a business, or the exercise of a profession, vocation or occupation, will be liable if they are not of a casual or non-recurring nature. The first question, in this case, for consideration is whether the receipts can be said to have arisen from business or the exercise of a profession, vocation or occupation. The word 'business' is not defined in the Act exhaustively. In section 2 (4) it is merely stated that 'business' includes "any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture." The best definition of the word is that given in *Smith v. Anderson* (1), viz., "anything which occupies the time and attention and labour of man for the purposes of profit is business." In the absence of an exhaustive definition in the Act, the above meaning of the word can be acted upon. In the present case, the winding up of the affairs of Mr. Sobhani did occupy the time, at-

(1) (1880) 50 L. J. Ch. 43.

tention and labour of the assessee and the occupation was for the purpose of what I am tempted to call a very handsome profit. To work for nine months to settle huge claims exceeding 163 lakhs of rupees and deal with 1,00,000 bales of cotton and receive as a remuneration Rs. 1,88,750, is nothing but, in my humble opinion, doing 'business' as defined above. The receipts may also be said to have arisen from the exercise of an 'occupation'. This latter word is not defined in the Act; its ordinary meaning as given in the concise Oxford Dictionary is "what occupies one, means of filling one's time, temporary or regular employment, business, calling, pursuit." The meaning of the word is wider than that of 'business' and whatever the assessee has done to earn the above sum will satisfy the above meaning of the word fully. I have not the least hesitation in saying that the receipts in this case are those arising from a business or the exercise of an occupation. This is enough to make them liable. However, I will just consider here before concluding whether such receipts can be termed "casual." The meaning of this word, which is also not defined in the Act, as given in the above mentioned dictionary, is as under: "Accidental, irregular; undesigned; unmethodical; careless." The last meaning, viz., 'careless' is not intended to apply to cases of this kind. The other meanings can apply and there is not the least doubt that the receipts in question are neither accidental, nor irregular, nor undesigned, nor unmethodical. The assessee's Solicitors inform me that the remuneration in this case was fixed at one per cent, on the sale proceeds of the cotton of the insolvent firm. The receipts are not accidental because they are not the result of any chance or accident but of a regular work for nine months. They are not irregular in any way, nor undesigned, nor unmethodical. They have been methodically and systematically calculated at a certain percentage and designed as remuneration for labour involving the settlement of tremendously large complicated claims, and realisations of lakhs and lakhs of rupees in the matter of an attempted corner of the Bombay cotton market. These are regular, designed, methodical receipts arising not from any chance or accident but on account of the devotion by the assessee of his valuable time, energy and labour, to extricating the cotton market from what might have developed into a state of hopeless confusion which always follows reckless speculation and attempts involving crores of rupees to corner a cotton market. For these reasons, I am forced to conclude that this section 4 (3) (vii) cannot apply to those receipts."

The reference was heard.

Kanga, Advocate-General, with *Sir John Bowen*, Government Solicitor, for the referor.

Sir Chimanlal Setalvad, instructed by *Captain and Vaidya*, for the assessee.

JUDGMENT.

MACLEOD, C. J.—This is a reference under s. 66 (2) of the Indian Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Bombay Presidency, in the matter of the assessment of the income of *Sir Purshottamdas Thakordas*, hereafter called the assessee. In his return of income for the purposes of assessment for the year 1923-24, the assessee, while declaring his income from all sources, had made a note as under :—

"Besides this I received during Samvat year 1978, Rs. 1,88,750 as remuneration for winding up the estate of *Umar Sobhani* which being an extraordinary source of income is not liable to taxation."

The Income-tax Officer, however, did not exempt this item from assessment. Thereupon an appeal was lodged before the Assistant Commissioner of Income-tax who held that this item was rightly taxed. Thereupon the assessee applied for a reference, and the Commissioner of Income-tax has made this reference on the question raised with his opinion thereon.

It seems strange that in a reference of this kind, the Commissioner has not stated what was the profession, vocation or occupation of the assessee. But it has been admitted during the course of the argument that the assessee is a cotton merchant.

In 1922 there was a crisis in the cotton market owing to endeavours made by the firm of Umar Sobhani to corner the market. He had been compelled to keep on making very extensive purchases of cotton in order to maintain prices, but his resources failing it became known to the creditors of the firm, and the market in general, that the firm was not in a position to finance further the huge purchases which had been made so that its failure had become imminent. As a crisis would necessarily result if all its purchases were thrown upon the market, the firm and its creditors looked out for some one who would command the confidence of themselves and of all concerned to hold the cotton already purchased and sell it to the best advantage. The assessee consented to be appointed under a power of attorney to dispose of all the cotton bales for and on behalf of the firm, to pay what was due to the several Muccadams and Banks, and after deducting out of the net sale proceeds of the cotton bales all his costs, charges and expenses in respect thereof and his remuneration, to distribute the balance amongst the several persons and firms whose names had already been submitted by the firm of Umar Sobhani to the assessee. Under that power of attorney the assessee sold over 1,00,000 bales which realized about Rs. 1,63,00,000, and received as his remuneration Rs. 1,88,750. It will be noted that in his return of income when claiming exemption for this sum, the assessee refers to it as an extraordinary source of income. He does not refer to it as being income not arising from business or the exercise of his profession, vocation or occupation, which was of a casual and non-recurring nature. However, we may take it that the question now before us is whether the receipts in question can be exempted under section 4 (3) (vii) of the Act, which says: "Any receipts not being receipts arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee."

It has been argued for the assessee that these receipts did not arise from business; that "business" connotes continuity; and that only the receipts arising from a business which is carried on continuously can be assessed. But the section refers to receipts arising from "business" and not to receipts arising from "a business." The definition of "business" in section 2 (4) is as follows:—"Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture, and consequently it is not necessary that the receipts should arise from a business continuously carried on during the year to make them liable to assessment. Even if they arose from a single adventure in business they would be liable to be taxed.

Now it seems clear that the profession or occupation of the assessee being that of a cotton merchant, any receipts arising from the buying and selling of cotton would be considered as arising from trade or commerce, and the argument that receipts from an extraordinary transaction connected with business, such as the one in this case, which would not be likely to occur again for many years, can be placed in the same category as receipts entirely disconnected with business or the profession or vocation or occupation of the assessee which might be considered of a casual and non-recurring nature, cannot be accepted.

We are clearly of opinion, therefore, that the remuneration earned by the assessee owing to his having been appointed under a power of attorney by Umar Sobhani to realise the cotton which he had purchased, must be considered as receipts arising from business, and, therefore, liable to taxation.

There is no need consequently to consider the argument of the Commissioner with regard to the meaning of the word "business" or the word "casual," or the English authorities which have been cited before us.

The answer to the reference will be that in our opinion the receipts in question are not entitled to be exempted from taxation.

The assessee to pay the costs on the Original Side scale.

[108] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

[20th January, 1925.]

Ishar Das Dharam Chand, In the matter of ...

*Assessee.**

Income-tax Act (XI of 1922) Secs. 10 and 66 (2) and (3)—Assessee standing surety for another firm—Loss incurred, if deductible—Application to High Court for stating a case—All questions to be referred to be stated.

Loss incurred by an assessee by standing as surety to another firm unconnected with his business cannot be deducted in the computation of his taxable profits, such loss not being one incurred in connection with the assessee's business.

The application to the Court under Sec. 66 (3) of the Income-tax Act should specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner.* Where out of a number of points taken before the Commissioner, one question alone was raised in the application to the Court under Sec. 66 (3), objection cannot be taken by the assessee if the Commissioner confined his reference only to the point raised in the application before the Court.

Case [Miscellaneous Civil Case No. 655 of 1924] referred under section 66 (3) of the Income-tax Act (XI of 1922), by M. L. Darling, Esq., Commissioner of Income-tax, Punjab and North-West Frontier Province, with his letter No. 505-J. M., dated 21st August, 1924, for orders of the High Court.

R. B. Badri Das for the assessee.

Dalip Singh for the crown.

JUDGMENT.

BROADWAY, J.:—A joint Hindu family carrying on business under the style of Ishar Das Dharam Chand in Amritsar and elsewhere was assessed to income-tax by the Income-tax Officer on the 25th March, 1923. It was found, after what appears to have been a very full enquiry, that the income of this business liable to taxation amounted to over a lakh. The assessee then undertook to pay tax on a round sum of one lakh. This offer was accepted by the Income-tax Officer and the assessment was made accordingly. The firm then petitioned the Assistant Commissioner of Income-tax. The Assistant Commissioner, after going thoroughly into the points raised, upheld the assessment of the Income-tax Officer. Thereupon Messrs. Ishar Das Dharam Chand moved the Income-tax Commissioner under section 66 (2) of the Income-tax Act and raised the following points:—

(1) That the rejection of the statement of accounts submitted by the petitioner is opposed to law.

(2) That the assessing authorities were not justified in applying a flat rate of 5 per cent to determine the assessable income.

*A I R (1926) Lah. 168 ; 92 Ind. Cas. 249 (2).

(3) That the refusal to allow a loss of Rs. 25,000 incurred in Bombay as a business deduction was illegal.

(4) That the petitioners being members of an undivided family were entitled to a reduction of Rs. 75,000 for purposes of super-tax.

It was asked that these questions of law be referred to the High Court. The Income-tax Commissioner allowed the prayer as to the reduction of Rs. 75,000, for purposes of super-tax, but declined to refer the case to this Court on the ground that no questions of law were involved.

The petitioners then came up to this Court under S. 66 (3) of the Income-tax Act and asked this Court to take the action provided for by that sub-section in connection with the deduction of Rs. 25,000 referred to in the third ground mentioned above. This Court not being satisfied with the correctness of the Commissioner's decision required him to state the case and to refer it. The Income-tax Commissioner thereupon stated the case. He pointed out that the direction of this Court did not confine the statement of the case to the only point raised before the Court and, therefore, he stated the case relating to the three points, Nos. 1, 2 and 3, raised before him. Before us the case has been argued on behalf of the petitioners by Mr. Badri Das, while the learned Government-Advocate has addressed us on behalf of the Commissioner.

Mr. Badri Das has addressed us on two points only. He has urged : (1) that the application of a flat rate was without any material on record and was, therefore, erroneous and illegal; and (2) that a sum of Rs. 25,000 should have been deducted from the total income and treated as a loss. The second point is the point which was taken in the petition to this Court.

It appears that the petitioners have got a branch of their business at Bombay. There they stood surety for another firm. That firm became insolvent with the result that the petitioners had to pay the sum of Rs. 25,000. It has been held by the Income-tax Officer that the loan for which the petitioners stood surety had nothing whatever to do with the petitioners' business. The petitioners stood surety in order to do friends of theirs a kindness. It is unfortunate that they have been called upon to pay up for their friends but inasmuch as this standing of surety was not in the course of the petitioners' business, it cannot be said that the loss was incurred in connection with the petitioners' business. The refusal to allow this amount to be deducted from the total income was, therefore, perfectly correct.

As to the first point, the learned Government Advocate urged: firstly, that inasmuch as the only point raised before this Court by the petitioners was that relating to the deduction of Rs. 25,000, the statement of the case in so far as it related to any other points was unnecessary. In the alternative he contended that the decision on that point was one of fact and that the application of a flat rate was justified. The language of section 66 (3) is wide and it is not easy to say whether it was the intention of the legislature that this Court should confine itself to the points raised before it, or, whether the raising of one point in the application to the Court would necessitate the statement of all the points raised before the Commissioner, although not pressed in the application to this Court. Under section 66 (2) an assessee may apply to the Commissioner "requiring him to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court." If the Commissioner refuses to do this on the ground that no question of law arises the assessee may under section 66 (3) apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the

Commissioner to state the case and to refer it, and on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

It seems to me that the application under section 66 (2) to the Commissioner should state the questions of law which the petitioner desires to be referred to the High Court and I am also inclined to the view that the application under section 66 (3) should also specify the question or questions of law which the applicant considers ought to have been referred to the High Court by the Commissioner. In the present case, three points were taken before the Commissioner in the application under section 66 (2). One question alone was raised in the application to this Court under section 66 (3), and it seems to me that had the Commissioner confined his reference to the point raised before this Court objection could not have been taken to his action. As he has, however, stated the case on the other question I think it necessary to dispose of it.

In this connection an examination of the proceedings shows that the enquiry was not a cursory or a summary one. The Income-tax Officer called for the accounts and after an examination of them, as well as of an auditor's report based on them, came to the conclusion that they were not reliable. This undoubtedly is a pure question of fact. The Income-tax Officer then after a consideration of the dealings accepted the turnover as shown by the petitioners and came to the conclusion that a flat rate of 5 per cent. was a reasonable amount to fix. His finding that a profit had been made is also a question of fact, and the assessment based on a 5 per cent. flat rate cannot be regarded as unreasonable. Further, in the present case it will be seen that the petitioners themselves offered to pay on one lac, and I would, therefore, hold that the conclusions arrived at by the Income-tax Officers are correct, and would dismiss this application with costs.

[109] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Krishnan.

[22nd January, 1925.]

Commissioner of Income-tax, Madras

... *Referring Officer.*

v.

Chengalvaraya Chetty and Munisami Chetty

... *Assesseees*.*

Income-tax Act (XI of 1922) Sec. 10—Profits of a trade—Mercantile system of accounts—Closing stock of a year valued at market price—Opening stock of next year valued at cost price—Market price less than cost price—If proper method of calculation.

The assessee, a dealer in piece-goods, submitted his income-tax return for a certain year showing a loss during that year by valuing his closing stock on hand at the market price on that date which was considerably below the cost price and on that basis got exemption from tax for that year. For the succeeding year the assessee valued the opening stock at the original cost price and not at the lower market value entered in the previous year's return and again claimed exemption by returning a loss during this year also.

Held, that the assessee having elected in the previous year to value his stock at the market price for the purpose of showing his trade loss during that year was not entitled in the succeeding year to revert to the original cost price as representing the value of the opening balance of the remaining stock on hand, but must value them at the lower market value fixed by him as ruling at the end of the previous year. If the assessee made a profit on the above basis of lower market value, such profit is assessable to income-tax, even though the transactions of the two years taken together ended in a net loss to the assessee.

Case [Referred Case No. 16 of 1924] stated under section 66 (3) of the Income-tax Act, XI of 1922, by D. N. Strathie Esq., Commissioner of Income-tax,

* (1925) I. L. R. 48 Mad. 836; 49 M. L. J. 425; A. I. R. (1925) Mad. 1242; 91 Ind. Cas. 137.

Madras, in his letter No. 1414, dated 15th October, 1924, in pursuance of the order of the High Court, dated 15th August 1924, and reported in I I T C 390.

CASE.

1. As required by the High Court's order quoted above I have the honour to submit under section 66 (3) of the Indian Income-tax Act for the decision of the Hon'ble the Judges of the High Court the following statement of the case relating to the assessment of the petitioners, Messrs. Chengalvaraya Chetty and Munisami Chetti, for the year 1923-24, together with my opinion on the question of law which has been framed by the High Court.

"Whether where a man has been carrying on one business which is a losing concern and he had not sought to set off loss against any other business he carries on which ended in a profit and no such advantage has been obtained, the mere fact that for the purpose of showing that he has made no profit for the year he gave the market value at the close of that year should be deemed conclusive against him even though he got no advantage by the form in which he has submitted his income-tax return and whether he should be deemed to have made a large profit, while as a matter of fact he has incurred a large loss."

2. The facts of the case are as follows :—

The petitioners, as is admitted in the affidavit, keep their accounts in accordance with the mercantile system of accountancy. Under that system the result of a year's trading is ascertained by preparing a trading account in the following form :

<i>Dr.</i>	<i>Cr.</i>
Opening stock	Sales
Purchases	Closing stock

This account is balanced by adding a sum to represent profit or loss according as the total on the credit or debit side may be the greater. The net profit or loss is then ascertained by preparing a profit and loss statement in which the working expenses are brought to account. For the assessment of the year 1922-23 the petitioners filed a combined trading account and profit and loss statement for the 12 months ending 12-4-22. A copy of this document is appended (Ex. A)*. The opening stock at the beginning of the year was shown in it as 12,570 pieces valued at Rs. 13-8-0 per piece. The closing stock was shown as 7,573 pieces valued at Rs. 6 a piece and the result of the year's trading was shown as a loss of Rs. 1,03,007. This statement was accepted by the Income-tax Department and the assesseees were declared not liable to income-tax for the year 1922-23. It is pertinent to remark here that the petitioners have never proved the correctness of their valuation of the opening stock of the account year 1921-22. The handkerchiefs which the petitioners sell are not bought by them as such but are woven by the petitioners and the cost price to the petitioners is the price paid for yarn *plus* the cost of weaving. The valuation at Rs. 13-8-0 a piece therefore represents not a price actually paid but an estimate by the petitioners of the cost to them of each piece sold. The valuation may, however, for the purposes of this reference, be taken as substantially correct.

3. In order that all profit or loss may be fully brought to account, it is absolutely essential that the figure given in the trading account of a year as the value of the closing stock should be identical with the figure given in the trading account of the following year as the value of the opening stock. This principle will be found enunciated in the standard work on Accountancy by Mr. F. W. Dickse (page 168) as follows :—

*Omitted in this report.

"As there is no interregnum in the career of a going concern, it must be considered that the stock has been purchased at the same price as that at which the same concern took credit for it at the close of business the previous evening up to which time the preceding account is prepared. The value therefore to be inserted as the first item on the debit side of the trading account is the exact figure at which the stock-in-trade was valued the evening before." In accordance with this principle the petitioners should have valued the opening stock of the account year 1922-23 (7,573 pieces) at Rs. 6 per piece. Instead of this, for the assessment of the year 1923-24, they presented a profit and loss statement a copy of which is appended (Ex. B)* in which they valued this stock at Rs. 13-8-0 a piece, i. e., at the value which the goods were said to have borne at the beginning of the account year 1921-22. The Income-tax Officer in making the assessment correctly re-valued the opening stock of the year 1922-23 in accordance with the figure given by the petitioners themselves, with reference to the same 7,573 pieces, in their profit and loss statement for 1921-22. The result of this necessary alteration was that the petitioners' trading account for 1922-23 showed a profit of Rs. 43,740. The petitioners appealed to the Assistant Commissioner, Central Range, under section 30 of the Income-tax Act. The appeal was dismissed for the reasons given in the order appended (Ex. C)*.

4. Against the order of the Assistant Commissioner the petitioners put in a petition to the Commissioner requesting him to "place their papers before the High Court of Judicature and obtain their decision under section 66 of the Act XI of 1922". As the Commissioner could not find that any question of law arose in the case, he asked the petitioners in his letter dated 28-4-24 to state the points of law which they required him to refer to the High Court. No reply having been received, the Commissioner passed orders on 21-5-24 dismissing the application on the ground that no question of law arose out of the assessment. A copy of the Commissioner's order is herewith enclosed (Ex. D)*. Against this they made an application to the High Court under section 66 (3) on which I have been ordered to state a case.

5. The subject of this reference as defined by the learned Judge involves at least two questions requiring separate answers. It will be convenient to deal first with the second of these, viz. "Whether he should be deemed to have made a large profit, while as a matter of fact he has incurred a large loss." It need hardly be said that the answer to this question, as it stands, must be in the negative. In assessing a person to income-tax the Income-tax Officer has to determine, in accordance with the method of accounting regularly employed by the assessee (section 13) the amount of the profit or loss of the previous year; and if he finds that the result of the previous year's transactions was a loss, there is no provision of law which could enable him to deem that the assessee had made a profit. I submit, however, that in this case the Income-tax Officer found, from the evidence furnished by the accounts themselves, that in the year of account 1922-23 the petitioners had made a profit; and in making the assessment he correctly computed the amount of the profit in accordance with the provisions of section 13. The Income-tax Officer's finding is a finding of fact based on the accounts and there are no materials before the Court to justify the reversal of that finding.

6. The other question framed by His Lordship may be expanded as follows :—If an assessee in a particular year incurs a loss in one business and derives profit in another and the profit exceeds the amount of the loss, he is assessed on the difference between these two amounts. In such a case he may be considered as having received exemption from tax on a portion of his profits equivalent to the

*Omitted in this report.

amount of his loss; because the amount of loss has been set off against the amount of profit. If, however, he has incurred a loss, and there are no profits from any other source in that year against which the loss can be set off, this exemption cannot take place. The learned Judge's suggestion is that since the petitioner had no profits from any other business in the year 1921-22 and since accordingly he did not derive any benefit by way of exemption of the kind above specified from any part of his loss of that year, he should in fairness be allowed to derive such benefit by carrying forward part of the loss into the year 1922-23 and setting it off against the profit of that year. This suggestion, whether right or wrong in the abstract, cannot be reconciled with the principles underlying the Indian Income-tax Act, XI of 1922.

7. It is a distinctive feature of income-tax law as it stands at present in British India that the profit or loss of each "previous year" has to be determined without reference to the profit or loss of any other year. This is not so under the English law, which allows the tax of a year to be based on the average income of the three preceding years. Under the English system if a trader were to make in three successive years a profit of Rs. 2,000, a loss of Rs. 10,000 and again a profit of Rs. 5,000, he would not be liable to tax in the fourth year because the average of the three preceding years would be a minus figure. But under the Indian system, given the same conditions, he would be liable in the fourth year to tax on an income of Rs. 5,000 representing the profit of the previous year. What the petitioner is in effect claiming in this case is that part of the loss which he sustained in the year of account 1921-22 should be carried forward to the account year 1922-23 and set off against the profits of that year. This, while it would be permissible under the English law, is contrary to the fundamental principle on which the Indian income-tax is based, viz., the principle of assessment in each year on the income of the previous year.

8. My opinion therefore on this case is that the petitioners made a profit in 1922-23 on which they were correctly assessed in 1923-24 and that they cannot in law be permitted to set off against that profit any part of the loss sustained in 1921-22.

M. Patanjali Sastri, for Crown.

A. Suryanarayana for the assesseees.

JUDGMENT.

COUTTS TROTTER, C. J.:—This is a case in which my learned brother, Kumaraswami Sastri, J., directed the Commissioner of Income-tax to state a case for the opinion of the High Court, under section 66 of the Income-tax Act.

The learned Judge did something further which the section does not provide for; he framed the question which he supposed to arise from the facts as set out in the Commissioner's report. With great respect to the learned Judge, I do not think that the question he framed was the real question raised in the case, and I think that the question as he has framed it is so beset with assumptions and begged questions that it would be impossible to decide fairly what the real point in this case is by any answer that could be given to the highly involved question he formulated.

The facts here are very simple. The assesseees are a firm of piece-goods merchants in this city and they keep their books and render their accounts to the income-tax authorities in what is known generally as the mercantile system of accounts. It is obviously a very rough and ready method; but it is the one that they have adopted and the one that the income-tax authorities are prepared to accept (provided they are satisfied with the honesty of the items set out) as giving sufficiently, for practical purposes, an accurate figure on which they can assess income-

tax. The method is this: you set out on the debit side your opening stock and add to that the purchase of stock made during the year, you then set on the contra side of the account the sales during the year and then you add to that the value of the stock on hand at the close of the year. Then, of course, you add to the debit side the establishment charges and the interest, if any, paid to creditors and so forth during the year. I should add that the accepted rule is that the assessee in crediting the closing stock figure is to take either the cost price or the market value which ever be the less—a provision obviously intended to be in favour of the trader and enables him more evenly to distribute his loss.

Now for the year April 1921-22 an account was rendered on that footing and it showed a trading loss during the year of one lakh and accordingly these people were not assessed to income-tax at all. The loss arose in this way; they started their year with 12,570 pieces which were valued at what no doubt was taken to be the cost price, viz., Rs. 13-8-0 a piece, and at the end of the year there was left on their hands a balance of 7,573 pieces, and in accordance with the then market rate, those pieces were valued down to Rs. 6 a piece. The result was a trading loss of just over a lakh and I ought to remark, because it has a bearing on what I am going to say later, that if those goods had been put down at Rs. 13-8-0 a piece, their cost price, there still would have been a trading loss of some Rs. 45,000; so that the assessees really stood to gain nothing if the figure of Rs. 6 was an undervaluation. Now comes the next year. In that year they start off their debit side to stock on the 13th of April, 1922, 7,573 pieces at Rs. 13-8-0 a piece by which means they work out a loss of Rs. 15,000 and odd. The contention of the income-tax authorities is that the stock on the opening of the account must be put at the same value as it was put as stock left on hand on the other side of the previous year's account. That seems so obvious that one must scrutinise carefully what is said against it.

The question framed by the learned Judge ends up with the statement "whether he should be deemed to have made a large profit, while, as a matter of fact, he has incurred a large loss." That begs so many questions that I really hardly know how to deal with it. The question is not whether a man has made a loss from the beginning to the end of his dealings with certain goods, but whether he has made a loss or a profit during the current year's trading, having regard to how he started and how he ended up. Of course, if you had to take it, that he could go on year in and year out writing off all this loss against the cost price, no matter how old the pieces left on hand, you might reach almost any result. What he does is this. He writes down at the end of the year his goods at the value at which they stand in the market, as he had to adopt the system of accounts in vogue. That gives him in certain cases a benefit—there is always a provision, which is intended for his benefit, that his losses in other branches can be set off. The principle, if it can be called a principle, contended for by the assessee would enable him, having cut his loss in one year, to go on claiming to deduct the same loss year in and year out and I cannot illustrate the absurdity of that better than by the hypothetical case that I put in the course of the argument. Supposing in the year 1921-22 the assessee had underwritten his loss with a firm of underwriters—I believe there are underwriters who will guarantee trading losses—and at the end of the year he goes to his underwriters and says :—I bought at Rs. 13-8-0 a piece ; this stock was worth Rs. 13-8-0 a piece at the beginning of the year ; it is now worth Rs. 6 ; Rs. 7-8-0 is my loss ; please pay me Rs. 7-8-0 ; I do not know what defence the underwriters would have to that claim. Suppose that he goes again next year to the underwriters with the same purpose of having his trading loss underwritten, what are the underwriters going to say if he says that the value of the same stock is Rs. 13-8-0 a piece ? The underwriters would say : We paid you yesterday a partial loss on the footing that these goods had deteriorated to

Rs. 6 a piece, now you again value them at Rs. 13-8-0 ; of course, the first observation is that no underwriter would accept such valuation. If through accident or misapprehension as to the identity of the goods, he got a second policy, and sued upon it, the defence of the underwriters would be "gross overvaluation," and to that defence it seems to me that the assured has no answer. He would be getting more than an indemnity. I cannot see that the principle is in the least different because you are dealing between the trader and the Government instead of between the trader and his underwriters. The question is, what in the proper mercantile sense is his loss or profit in the year ? Appeals *ad miseri cordiam* are beside the point. The question is not so much one of law but of business common sense. But there is a principle involved which determines the legal position, and I think the answer is clear that, as the value of the stock on the 13th of April 1922 was in fact and in truth Rs. 6 a piece, the assessee is not entitled to reduce what are truthfully called his profits by putting the fictitious value of Rs. 13-8-0 a piece on the stock-in-trade merely because that was the sum he happened to pay for it before the year of assessment. In my opinion, to allow this to be done would be to let the assessee ascertain not his profit or loss, but to debit himself with the same loss on the same goods *in toto* for perhaps a course of years. That cannot be permitted. If these goods had been valued at Rs. 6 and the market had gone down to say Rs. 4 he would of course be entitled in this trading year to treat the difference between Rs. 6 and Rs. 4, i. e., Rs. 2 as another loss justly debited to this year. But in the event of the price going up above the market rate at the beginning of the year which we must take as an accurate valuation, the difference is his profit.

In our opinion, the answer that we should return to the question is that the assessee, having elected in the previous year to value his stock at the market price of Rs. 6 a piece for the purpose of showing his trade loss during that year, is not entitled in the succeeding account to revert to the purchase price figure as representing the value of the goods, but is bound by the market price which he has fixed and been assessed on in the previous year unless he can show that he made a mistake as to the market value. Perhaps the simplest way of putting it is to say that the trader made a profit in this year, but it was not a profit sufficient to compensate him for his loss in other years.

Each party will bear his own costs in this Court. Costs in the lower Court will be paid by the assessee to the Government as directed by the learned Judge ; Vakil's fee Rs. 50 (Rs. Fifty).

KRISHNAN J.—I agree with what has fallen from my Lord the learned Chief Justice in this case except that I would add that the learned Judge who made the reference was not wrong in stating what in his opinion was the question of law that should be considered in this case, for a reference can be directed only on a point of law. It is difficult however to understand what exactly the learned Judge thought should be decided in this case. The question stated by him is put in such a form that, taking the hypothesis involved in it, it is impossible to give any answer except in the negative. That is not a fair way of framing a question. It should be so framed as to leave to the Court which afterwards hears the reference to decide the matter on the facts stated by the Commissioner of Income-tax who makes the reference.

The particular case before us is a very simple one. The assessee had a large stock of piece-goods, 12,570 pieces, at the beginning of 1921 which he says he bought at Rs. 13-8-0 per piece. At the end of the year the value of these goods fell in the market to Rs. 6 per piece according to his own statement. In submitting his statement to the income-tax authorities for the year April 1921 to March 1922 (Exhibit A) he has taken into account the falling price in the market for the whole

stock in calculating his loss for the year though he had not sold all the stock. He has treated the remaining stock in his hand at the end of the year, 7,573 pieces, as being worth only Rs. 6 a piece and on that footing he has estimated his loss. In the next year instead of taking that stock as being worth Rs. 6 at which he valued it the day previous to the beginning of the year he valued it at Rs. 13-8-0 again and on that footing he has estimated his loss. He contends before us that, in fact, he made no profit over the transaction taken as a whole, that is, out of the 12,570 pieces he purchased, if the total selling value which he realised is taken into consideration, he has really lost money. That may be so. The question is whether we ought to take that into consideration and hold that though he had in his statement of account for the previous year elected to treat his loss on the whole of the 12,000 and odd pieces by the fall in the market price as a loss that occurred that year he should be allowed again to say the next year that the real loss occurred on the balance stock when that stock was sold that year. I do not think he can be allowed to do so. The learned vakil argues that if the loss which his clients had incurred on the sale of the goods be split up and only the loss incurred on the stock which he sold in the year 1921 had been taken for the purposes of the statement for that year, he would still have made a loss for that year and the income-tax authorities would not have been able to levy any tax on him. That may be so but we cannot take it into consideration at all. Having elected to treat his loss as having occurred in the year 1921-22, he cannot be allowed to treat it again as a loss in the next year also. It will not do to allow him to re-open the previous return and newly distribute the loss between the two years. It may be an advantage to do so in this case, but it would more often be a disadvantage to the assessee to do so. Having been allowed to treat his loss as one on the stock in hand the previous year, he cannot be allowed again to treat it as a loss on the sales in respect of the same stock the next year. That is the only point that really arises in this case. I entirely agree with the learned Chief Justice in the answer that he has proposed to give to the income-tax authorities that we consider that they were right in treating the second year's statement as erroneous in putting Rs. 13-8-0 as the initial value of the stock he had on hand and that he was only entitled to put Rs. 6 as the value of that stock. This is not a case really of the assessee having made no profit for the second year, for that entirely depends upon how the calculation is made. If he starts the second year with stock worth Rs. 6, the value he has put on it at the end of the previous year and if he sell it at Rs. 8-8-0 as he seems to have done, there is manifestly a profit.

[110] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Mr. Justice Greaves and Mr. Justice Mukerji.

[26th January, 1925.]

Nirmal Kumar Singh Nowlaksha

...

*Assessee**

v.

The Secretary of State for India in Council.

Income-tax Act (XI of 1922) Secs. 22 and 23 (2)—Income-tax Officer not satisfied with assessee's return and documents—Obligation to issue notice to assessee to adduce further evidence—If mandatory or directory—Notice, if should specify points.

If the Income-tax Officer is not satisfied with the return submitted under Sec. 22 of the Income-tax Act, he is bound under Sec. 23 (2) to serve upon the person making the return a notice requiring him on a day to be specified to produce evidence to support the return.

* (1925) 29 C. W. N. 591; A. I. R. (1925) Cal. 890; 88 Ind. Cas. 404.

Per Greaves J.—Such notice may be waived.

Per Mukerji J.—The provisions of Sec. 23 (2) are mandatory. Sections 22 and 23 read together appear to be intended to give to the assessee two opportunities of supporting the return he has submitted.

Per Greaves J.—Section 23 (2) does not impose upon the Income-tax Officer any obligation to specify directly the points upon which evidence is to be given. It is a sufficient compliance with the provisions of the section if he gives notice to attend or notice to produce evidence in general terms.

Per Mukerji J.—The notice under Sec. 23 (2) should, if possible, specify the points upon which the assessee has to produce evidence.

This was a reference [Reference No. 10 of 1924] made by the Commissioner of Income-tax, Bengal, under section 66 (3) of the Income-tax Act (XI of 1922) stating certain questions of law to the High Court for opinion.

The respondent, Nirmal Kumar Singh Nowlaksha, who resided at Azimgunge, Murshidabad, carried on business in various commodities in six different places in Bengal and Behar. In pursuance of a notice issued by the Income-tax Officer of Murshidabad, he filed his return of income for 1922-23, produced his accounts in support thereof, and furnished an abstract statement of profit and loss for reference, if necessary. For the purpose of computing the profits of the business, the Income-tax Officer accepted the total amounts of receipts under different heads shown in the statement, but in dealing with the expenditure incurred for earning the profits, he, in disregard of the original accounts, as also of the statement compiled therefrom, is alleged to have adopted an arbitrary method and allowed deduction by mere guess, thereby totally rejecting the debit side of the accounts. As a result of such calculations, the Income-tax Officer assessed the respondent with an income of Rs. 1,02,236 and fixed the amount of income-tax and super-tax payable by the respondent at Rs. 12,919.

Against this assessment the respondent preferred an appeal to the Assistant Commissioner, who, however, dismissed the appeal. Thereupon, the respondent asked the Commissioner of Income-tax, Bengal, to submit certain questions arising out of the case for the opinion of the High Court under section 66 (2) of the Act, but the Commissioner refused to submit such a case for reference, holding that no question of law arose.

Thereafter, the respondent obtained a rule from the High Court which was made absolute, and their Lordships (Mr. Justice Suhrawardy and Mr. Justice Chakravarti) held that the questions of law raised by the respondent challenged "the very foundation of the assessment" and they "arose upon the proceedings adopted in the case," and directed the Commissioner to refer the two following questions for the opinion of the High Court: (1) Is it legal to make an arbitrary assessment in cases when a return was duly submitted, without giving a notice in terms of section 23 (2) of the Act for producing evidence; and (2) had the Income-tax Officer jurisdiction to make an assessment in the way it was done, without serving a notice under section 23 (2) after a return had been made? See the judgment reported in 1 I. T. C. 393.

The Commissioner of Income-tax, in making the reference, stated that the answers were in the negative, and that it was true that no such notice as required under section 23 (2) was served. But as the assessee produced his accounts along with his return of income, which were examined for two days by the Income-tax Officer, in his opinion there had been "a technical non-compliance" with the provision of the law and this should not be held to invalidate the assessment.

Babu Surendra Nath Guha and *M. Nuruddin Ahmed* for the Government contended that the assessee had waived notice by his conduct and there had been a substantial compliance with the law.

Babus Tarak Chandra Chakravarty and *Profulla Chandra Chakravarty* for the assessee submitted that the provisions of section 23 (2) were mandatory, and the Income-tax Officer was bound to serve a notice requiring the assessee to produce evidence on "specified points" to be stated by that Officer if the latter had reason to believe that a return was either incorrect or incomplete. The Income-tax Officer had jurisdiction to make an arbitrary assessment under section 23 (4) if the assessee either failed to make a return or failed to comply with the terms of any notice either for production of evidence generally or on "specified points." As there was no such notice given and, consequently, no default on the part of the assessee, the assessment was illegal.

JUDGMENT.

GREAVES, J.:—This is a reference made to us by the Commissioner of income-tax in accordance with a previous direction of this Court. The respondent was called upon by the Income-tax Officer of Murshidabad to forward a return under the provisions of section 22 of Act XI of 1922. Considerable delay occurred in furnishing the return and extensions of time were granted on several occasions. Ultimately on the 11th October the return was filed and so far as I have been able to ascertain this return which was filed by the gomasthas or servants of the respondent was examined on the 12th and 13th of October in the presence of the gomasthas. On the 13th of October an assessment was made on the respondent. It appears that the respondent's return of the profits of his six businesses was accepted, but that the Income-tax Officer refused to accept the deductions which the respondent sought to make in respect of the expenses of his business and made a percentage deduction from the profits to represent the legitimate deductions for expenditure incurred and we are told that this percentage was calculated without any relation to the actual facts of the expenditure incurred. An appeal was presented against the assessment to the Assistant Commissioner of Income-tax of the Burdwan Range and he upheld the assessment and the Commissioner refused to make a reference. An application was accordingly made to this Court and the Commissioner was directed to make the reference which is now before us. It is now necessary to turn to the provisions of the Act. Section 23 of the Income-tax Act provides that if the Income-tax Officer has reason to believe that the return made under section 22 is incorrect or incomplete he shall serve on the person who made the return a notice requiring him on a day specified therein either to attend at the office of the Income-tax Officer or produce or cause to be produced at the office any evidence on which the assessee relies in support of the return. Sub-section (3) provides that on the date specified in the notice the Income-tax Officer after hearing such evidence as the assessee may produce and any other evidence which he may require on specified points shall by an order in writing assess and determine the sum payable on the basis of such assessment. Sub-section (4) provides for cases in which there is a failure to make a return under section 22 or failure to comply with the notice issued under sub-section 4 of section 22. The sub-section further deals with a failure to comply with all the terms of a notice issued under sub-section (2) of section 23. There is no doubt that if the Income-tax Officer is not satisfied with the return he is bound to serve the notice specified in sub-section (2). In the present case no such notice was served. But I think that the notice was waived. The return was made in person, as I have already stated, on the 11th October and it was examined on the 12th and 13th of October in the presence of servants of the assessee. I can not conceive that there was not considerable discussion at any rate with regard to the items which were disallowed and it must be that arguments were urged and reasons adduced by the servants of the assessee as to what items of expenditure should have been allowed. Apparently no application was made by the servants of the

assessee to adduce any further evidence, oral or documentary, with regard to the items disallowed and the only conclusion which I can draw is that no other evidence was available and that after the interview on the 12th and 13th when the accounts were examined all matters were urged by the servants of the assessee which could have been urged against the disallowance. It has been urged before us that there is some obligation on the Income-tax Officer to serve a notice indicating the points on which evidence should be produced. I do not find any such indication in section 23. It is true that under sub-section (3) it is open to the Income-tax Officer, if he so desires, to require evidence to be produced on specified points but he is not bound to specify any point on which evidence is required and in my opinion it is a sufficient compliance with the provisions of the section on his part either to give notice to attend or notice to produce evidence in general terms and in my view the reference to "all the terms of notice" in sub-section (4) means all the terms of the notice directed to specified points if the Income-tax Officer thinks fit to specify any special points on which he requires evidence. But, as I have already stated, I do not think that the section imposes upon him any obligation to directly specify the points upon which evidence should be given. In my view, in the present case although no notice was served under sub-section (2) of section 23 as required by the Act, this was waived and I think that the servants of the assessee were fully aware of all the matters in the return which were questioned by the Income-tax Officer and that they should not now be given any further opportunity of adducing evidence which they did not ask or desire to adduce either on the 12 or the 13th of October. But my learned brother takes a different view and as I do not think that this is a question upon which there should be a reference to a third Judge and, as I understand, he thinks that the assessee should have a further opportunity of adducing evidence with regard to the items which were disallowed, I do not think that I should stand in the way.

The result will be that this judgment and that of my brother Mukerji will be forwarded to the Commissioner in accordance with the provisions of section 66, sub-section (5) in order that he may dispose of the case in conformity with the judgment.

MUKERJI, J.—This is a reference made by the Commissioner of Income-tax under the provisions of section 66, sub-section (3) of the Income-tax Act, XI of 1922. The reference has been made in pursuance of an order passed by this Court, on the 28th August, 1924, in Civil Rule No. 478 of 1924. The circumstances under which the order was passed by this Court and the facts out of which the reference arises have been set out in detail in the judgment just delivered by my learned brother and it will not be necessary for me to recapitulate them.

The Commissioner of Income-tax states in his reference that in the present case no notice under section 23, sub-section (2) was issued on the assessee because the assessee at the time of submitting his return produced along with it his evidence in support thereof, namely, his accounts. He states that the accounts were produced and examined for two days before the assessment was made. He further states that the assessee did not give the Income-tax Officer to understand that he had any further evidence in support of his return. He accordingly, is of opinion that although there may have been a technical non-compliance with the provisions of section 23, sub-section (2), the issue of a notice was superfluous and that the procedure followed by the Income-tax Officer, though not in strict accordance with the provisions of the section, was not, under the circumstances of the case, either unreasonable or inequitable; and in that view of the matter he recommends that the assessment should not be held to have been invalidated.

It is conceded that so far as the provisions of section 22 of the Income-tax Act are concerned they have been duly complied with. It is stated, as I have already

said, in the letter of reference that the return was duly submitted and that accounts were also submitted in support of the return and also that the accounts were examined prior to the assessment for two days. The question under these circumstances, is whether after all this, it was necessary to give the assessee a further opportunity under the provisions of section 23, sub-section (2), to adduce any evidence in support of the return. The Commissioner seems to suggest the object of issuing a notice under sub-section (4) of section 22 is practically the same as that of issuing a notice under sub-section (2) of section 23. In this, however, I am unable to agree. Reading sections 22 and 23 of the Act, it seems to me clear that the law intends that there should be two opportunities given to the assessee for the purpose of supporting the return which he has submitted. Under section 22 of the Act he is given an opportunity to submit such accounts or documents as the Income-tax Officer may require. When a return is submitted under that section the Income-tax Officer may proceed to deal with the matter on the basis of the return and may not require the assessee to produce any further material or he may, as required by sub-section (4) of that section call upon him to produce or cause to be produced such accounts or documents as the Income-tax Officer may require. Under section 23, sub-section (2), the law gives the assessee a further opportunity of producing any evidence on which the assessee may rely in support of the return. It is true that for two days in the presence of the assessee's Officer the accounts were examined by the Income-tax Officer. At the end of those two days the proceedings, in my opinion, came to a stage at which section 23, sub-section (1) could be availed of if the Income-tax Officer was satisfied that the return made under section 22 was correct and complete, but not beyond that stage at all. After the examination of the accounts for two days during which presumably the assessee's Officer had an opportunity of explaining the accounts to the Income-tax Officer, and I may take it also of producing such evidence as he could produce in order to show that the return was correct and complete, the Income-tax Officer had to determine whether he should proceed under the first paragraph of section 23. If he was of opinion that the return was correct and complete he could assess the income of the assessee on the basis of such return. Evidently, the Income-tax Officer was not of opinion that the return was correct or complete and therefore he did not think fit to proceed under sub-section (1) of section 23. When he came to be of that opinion, he should have proceeded under sub-section (2) of that section. The law provides that under those circumstances, before proceeding to make an assessment in accordance with his own judgment under the provisions of sub-section 4 of section 23, he should give the assessee an opportunity of producing further evidence. Under section 23, sub-section (2) when the Income-tax Officer has reason to believe that the return made under section 22 is incorrect or incomplete, he is bound to serve upon the person who made the return a notice requiring him on a day therein specified either to attend at the Income-tax Officer's Office or produce or cause to be produced any evidence on which such person may rely in support of his return. Under sub-section (3) of that section, if such evidence is produced, the Income-tax Officer after hearing such evidence as may be produced, and such other evidence as he may require, on specified points, shall assess the income of the assessee. Under sub-section (4) of section 23 if there is a failure to comply with all the terms of notice issued under sub-section (2) of section 23 the Income-tax Officer shall make the assessment to the best of his judgment. The intention of the law clearly is that if the Income-tax Officer makes up his mind not to assess the income on the basis of the return upon the ground that the return is not correct or complete the assessee is entitled to know the position and to have an opportunity of producing evidence in order to support the return.

A further question arises as to what should be the terms of a notice issued under sub-section (2) of section 23. The wording of the sub-section is to the

effect that the notice issued under that sub-section should require the assessee either to attend at the Income-tax Officer's Office or to produce or cause to be produced any evidence on which such person may rely in support of the return. That sub-section standing by itself would seem to indicate that a general notice calling upon the assessee to appear or to produce evidence or cause it to be produced is sufficient. On a perusal of sub-sections (3) and (4) of section 23, however, it seems to me that ordinarily the notice that is to be issued under sub-section (2) should contain the points upon which the assessee has to produce evidence, if he thinks fit; for under sub-section (3) the expression "on specified points" appears to be governed not only by the word 'required' but also by the word 'produced' appearing in that sub-section; and in sub-section (4) dealing with the question of failure to comply with the terms of notice issued under section 23, sub-section (2), the legislature speaks of failure to comply with "all the terms" of the notice under that sub-section. Moreover, it seems to me to be only fair that if an opportunity is to be given to an assessee to produce evidence in order to show that the return submitted by him is correct and complete he should be told, if possible, specifically, what the points are upon which such evidence is to be produced. In the present case it is conceded that no notice at all was served upon the assessee under the provisions of sub-section (2) of section 23. I am not prepared to hold that because the assessee's Officer was present at the office of the Income-tax Officer for two days at an earlier stage, there was a proper or substantial compliance with the provisions of the law; and with the utmost deference to the opinion of my learned brother, I am unable to hold that the failure of the assessee to produce any further evidence at that stage, can be construed as a waiver on his part to have a notice issued on him under sub-section (2) of section 23. The further opportunity, which the law allows the assessee by reason of the provisions of sub-section (2) of section 23, he has not had in the present case; and I am, therefore, of opinion that the non-compliance with the terms of that sub-section, which is admitted on all hands, has prejudiced the assessee.

Apart from all this the provisions of sub-section (2) of section 23 to my mind are mandatory, and no appeal in respect of an assessment made under sub-section (4) of that section lies to the Assistant Commissioner. Under such circumstances there is no reason why the mandatory provisions of an enactment in a taxing statute like the Income-tax Act should not be strictly observed in the matter of making an assessment under its provisions.

I, therefore, think that our answer to the reference that has been submitted to us should be that the provisions of section 23, sub-section (2) not having been complied with the assessment made has been invalidated and should be set aside and made over again in due compliance with the law.

[111] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Coyajee.

[5th February, 1925.]

The Jubilee Mills, Ltd.

v.

Appellant.

The Commissioner of Income-tax, Bombay

*Respondent**

Income-tax Act (VII of 1918), Secs. 51, 26—Payment of income-tax—Application for refund of tax—Commissioner—Reference to High Court—Collector—Rectification of mistakes in assessment.

* (1925) 27 Bom. L. R. 400; A. I. R. (1925) Bom. 257; 89 Ind. Cas. 595.

An application for the refund of income-tax already paid cannot be regarded as "in the course of any assessment under this Act" (viz., Indian Income-tax Act, 1918), and it is not open to the applicant to move the Chief Revenue Authority to refer a question of refund of assessment to the High Court under S. 51 of the Act.

Section 26 of the Income-tax Act 1918, only relates to a mistake in the demand of any assessment, and does not enable the discontented assessee who has paid the amount demanded from him, to re-open the question of the assessment. The section provides for the rectification of mistakes caused by the demand not corresponding to the assessment, and does not provide for any appeal to the Commissioner from the order of the Collector under Sec. 26 either rectifying the mistake or refusing to rectify a mistake on an application made by the assessee.

Proceedings under the Income-tax Act, 1918.

Appeal [O. C. J. Appeal No. 111 of 1924] from the decision of Mulla J. The facts are sufficiently set forth in the judgment.

Sir Chimanlal Setalvad, with *B. J. Desai*, and *B. K. Desai* for the appellant.
Kanga, Advocate-General, for the respondent.

JUDGMENT.

MACLEOD C. J.—This is an appeal from the order of Mr. Justice Mulla discharging a rule *nisi* taken out by the petitioners calling upon the Commissioner of Income-tax, Bombay, to appear and show cause why he should not be ordered to refer the questions set out in Ex. F, and in para 8 of the petition, together with his opinion thereon to this Court for its decision. The petitioners are a joint stock company incorporated and registered in Bombay on June 16, 1920. They were required by the Collector of Income-tax to make a return of their income for assessment for the year 1921-22. On October 27, 1921, the petitioners lodged accounts for the year ending June 30, 1921. Upon that the Collector issued notices of assessment for income-tax and super-tax for the year 1921-22, which were subsequently amended, and the amended notices were issued on January 3, 1922. The petitioners paid the income-tax and the super-tax demanded in the notices on February 6, 1922. In October, 1922, the petitioners alleged that they had discovered that the income-tax authorities had made a mistake in levying income-tax and super-tax on the basis of the accounts for the twelve months, ending June 30, 1921. Accordingly in November, 1922 they made a representation to the Senior Income-tax Officer pointing out the mistake and claiming refund of the income-tax already paid. The Senior Income-tax Officer replied by his letter of November 18, 1922, that the assessment to income-tax and super-tax levied against the company for 1922-23 was in order and needed no revision, and if they were dissatisfied they might appeal to the Assistant Commissioner of Income-tax, Bombay, against the same.

It will be seen that the Senior Income-tax Officer did not refer to the assessment for 1920-21 which was the assessment which the petitioners were complaining about in their letters to him.

The petitioners then applied to the Commissioner of Income-tax who gave his decision on June 19, 1923, as follows:—

"The petitioners' attention is drawn to the fact that the assessment against the Jubilee Mills, Ltd., objected to in their petition dated March 23, 1923, was levied in the year 1921-22 under proviso to Sec. 19 of the Act, 1918. The notice of assessment was issued on December 8, 1921. The tax after some minor modification was paid by the Company on February 6, 1922. No appeal against the assessment was made as provided for by S. 21 (1) (2) of Act, 1918. The undersigned declines to take action under Sec. 51 of Act, 1918."

A further representation was made to the Commissioner of Income-tax to which he replied on July 24, 1923, declining to accede to the petitioners' request to make a reference to the High Court. On February 8, 1924, the Commissioner,

who had since received a letter from the petitioners of the 6th instant, which is not on the record, replied that it had been decided to make a reference to the High Court in the matter of the income-tax and super-tax assessment of the Jubilee Mills, Limited, for the year ended March 31, 1922 under section 51 of the Indian Income-tax Act, VII of 1918, and that the same would be made in due course.

Mr. Hartley, who was then Commissioner, seems to have gone on leave and on April 29, 1924, his successor Mr. Vachha replied to the petitioners' letter of February 6, that he declined to reconsider the order already passed in the case on June 19, 1923, which we have just referred to.

The petitioners then took out this rule. Mr. Justice Mulla relying on the decision of this Court in *In re Panalal Ganesdas* (1), held that the application would not come within section 51 of the Act of 1918, as it was not made in the course of any assessment under the Act or any proceeding in connection therewith other than a proceeding under Chapter VII. We think that that decision is correct. When the assessment has been determined by the Collector, he shall serve on the assessee a notice of demand in the prescribed form as provided by section 20 of the Act. If the assessee objects, he may apply by petition to the Commissioner for relief against any order of the Collector in respect of such assessment which petition shall ordinarily be presented within thirty days of the receipt of the notice of demand. If the petition against the assessment is not presented, then it must be taken that the assessment is final and no application can be made under section 51.

The petitioners then contend that the application to the Collector was made under section 26 of the Act, under which the Collector may at any time within one year from the date of any demand made upon the assessee, rectify any mistake in connection therewith which has been brought to his notice by such assessee, and make a refund to such assessee in respect thereof. That section only relates to a mistake in the demand of any assessment and cannot enable the discontented assessee who has paid the amount demanded from him, to re-open the question of the assessment. The section provides for the rectification of mistakes caused by the demand not corresponding to the assessment, and does not provide for an appeal to the Commissioner from the order of the Collector under section 26 either rectifying the mistake or refusing to rectify a mistake on an application made by the assessee. Therefore, in this case it was not competent to the petitioners to apply to the Commissioner of Income-tax to refer the question which had arisen to the High Court, on the ground that it referred to the interpretation of certain of the provisions of the Act, or of some rule thereunder.

The appeal must be dismissed with costs.

Thakordas and Daru, attorneys for the appellant.

Government Solicitor, attorney for the respondent.

[112] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Krishnan.

[5th February, 1925.]

Commissioner of Income-tax, Madras

Referring Officer.

v.

Thillai Chidambaram Nadar

Assessee.*

Income-tax Act (XI. of 1922), Secs. 23 (2) and 63 (2)—Unregistered firm—Notice served on one member of firm—If proper service on firm.

* (1925) I. L. R. 48 Mad. 602; 49 M. L. J. 124; 23 L. W. 206; A. I. R. (1925) Mad. 1048; 90 Ind. Cas. 549.
(1) I. T. C. 151.

In the case of an unregistered firm, by virtue of Sec. 63 (2) of the Income-tax Act, service of notice under Sec. 23 (2) of the Act can be validly effected on any member of the firm and is not confined to service only on the member who made the return under Sec. 22(2).

Case [Referred Case No. 19 of 1924] stated under section 66 (2) of the Income-tax Act (XI of 1922.).

CASE.

Under section 66 (2) of the Income-tax Act, 1922 (XI of 1922), I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following question of law which has arisen in assessing the above parties for the year 1924-25.

"Whether in the case of an unregistered firm a notice under section 23 (2) should be served only on the member of the firm who made the return under section 22 (2) or whether under section 63 (2) of the Indian Income-tax Act XI of 1922, it can be served upon any member of the firm."

2. The essential facts of the case are:—

The assesseees are an unregistered firm carrying on business in partnership at Virudanagar within the jurisdiction of the Income-tax Officer, Ramnad.

The partners are :—

- (1) P. M. Ayyamperumal Nadar.
- (2) P. A. Ayyamperumal Nadar.
- (3) Thillai Chidambara Nadar.

For the assessment of 1924-25 the Income-tax Officer, Ramnad, issued to the assesseees a notice under section 22 (2) calling on them to make a return of their income in the prescribed form. The notice specified the names of the three partners, but the envelope containing it was addressed to "Messrs. P. M. Ayyamperumal Nadar and two others of Virudanagar" and was sent by registered post. It was received and acknowledged by the third partner mentioned above, i. e., the present petitioner. In response to this notice a return of the income of the partnership was submitted to the Income-tax Officer on 21st June, 1924 signed by one Palaniswamy Nadar. It has subsequently been discovered that this Palaniswamy Nadar is an undivided brother of Thillai Chidambara Nadar and that he has been helping him in the conduct of the firm's business. The Income-tax Officer was not satisfied that the return was correct and he therefore directed the issue of notices, one under section 22 (2) and another under section 23 (2) to the assesseees asking them to produce their accounts and other evidence in support of their return before him on 21st July, 1924. These two notices were, as usual, addressed to the three partners, the envelope being again addressed to "Messrs. P. M. Ayyamperumal Nadar and two others." They were sent by registered post, were certainly received by P. M. Ayyamperumal Nadar (the first partner) but were acknowledged by one Ramalinga Nadar, a clerk in the employ of P. M. Ayyamperumal Nadar on 4—7—24, i. e., 17 days prior to the date of hearing. It may be observed here that the receipt by P. M. Ayyamperumal Nadar of the notices calling for accounts was definitely admitted by the petitioner in para. 4 of his petition under section 27 to the Income-tax Officer. As the assesseees did not turn up on the date fixed for hearing, viz., 21—7—24, the Income-tax Officer assessed them under section 23 (4) to the best of his judgment.

3. Against this assessment the assesseees put in a petition to the Income-tax Officer under section 27 of the Income-tax Act asking him to re-open the assessment on the ground that the managing partner of the firm was one Thillai Chidambara

Nadar and that the notices asking for the production of accounts and evidence were not served on him. The Income-tax Officer declined to reopen the assessment for the reasons stated in his order (Ex. A enclosed).

4. The petitioners then appealed to the Assistant Commissioner, Southern Range, against the order of the Income-tax Officer under section 27. The Assistant Commissioner after hearing the petitioners' Vakil and examining the records found on the materials before him that the notices issued to the assesseees were validly served and that they were not prevented by sufficient cause from responding to the notice. He therefore dismissed the appeal. A copy of his order is enclosed as Ex. B.

5. An application under section 66 (2) was then submitted to the Commissioner asking that the general question whether the notices were properly and legally served should be referred to the High Court. In paragraph 1 above I have made the form of the question more precise and the petitioners' representative, Mr. F. S. Vaz, Bar-at-law, agrees that the question as framed by me really meets the point at issue.

6. I am of opinion that the provisions of section 63 (2) of the Income-tax Act govern this case and that the notice served on one of the partners of the firm was a correct and legal notice. The petitioner contends that section 63 (2) does not and cannot control section 23 (2) and that it is an enabling clause to be used only in cases where the principal assessee is absent or cannot be found. Reference was made by the petitioner's representative to a general legal maxim that a special provision is not overridden by a general provision appearing subsequently in the statute. It appears to me that in this case section 63 (2) is the special provision which explains and amplifies the general rule in section 23 (2). The assessee is an unregistered firm. The unregistered firm falls within the definition of "person" in the General Clauses Act, 1897, i. e., "any company or association or body of individuals whether incorporated or not." Throughout sections 22 and 23, therefore, if a firm is the assessee under consideration, the word "person" must be read as referring to the firm. Section 63 (2) lays down the manner in which notices under the Income-tax Act are to be served on a "person" when that person is a firm. It enacts that they may be addressed to any member of the firm. The original notice in this case calling for the return was addressed by registered post to one of the members of the firm. It was acknowledged by another member. The return was submitted on behalf of the firm by the undivided brother of one of the members, apparently on his behalf and with his authority. But the fact remains that the return was made by the "person" who in this case was the assessee, i. e., by the firm. The notice calling for accounts was addressed in the same manner as the first notice, i. e., to the firm which was the assessee. It was received by one of the members of the firm, i. e., by the "person" who made the return. It appears to me therefore that there has been full compliance with the provisions of section 23 (2) and that the assessment was perfectly legal.

7. It is perhaps unnecessary for me to refer to the merits of the case but as I find that assesseees are usually represented to the High Court as the innocent victims of an oppressive and bureaucratic department, I would like to draw the attention of their Lordships to certain facts already brought out in the orders of the Income-tax Officer and Assistant Commissioner which I have attached to this letter. The petitioners in this case have never yet responded to the notices requiring them to produce accounts and prove their income. In the past they have always been assessed under section 23 (4) on an estimate and have never before applied under section 27 to have their assessments re-opened. In this year the assessment was raised above the usual figure with the deliberate object

of forcing the petitioners to produce their accounts which they have hitherto concealed. It is only when they have been subjected to this high assessment that they come forward for the first time with objections regarding the language of the notice and the manner in which it is assessed. I would further point out, as the constitution of this firm and the personality of the manager had hitherto been concealed from the Income-tax Department by the firm's failure to produce accounts or appear in response to notices, it was impossible for the Income-tax Officer to adopt any other course than to utilise section 63 (2) and address the firm in the name of the partners.

M. Patanjali Sastri for the Referring Officer.

F. S. Vaz for the assessee.

JUDGMENT.

COUTTS TROTTER C. J.—It is with the greatest difficulty that I could extract a question of law of any sort in this case ; but, if there is any, I suppose it is this, as to whether under section 23 (2) of the Income-tax Act "the person who made the return" in the case of a firm means the identical person who made the original return. Commonsense would indicate that the only requisite is that the firm who made the return should, as a firm, have the notice properly delivered to them. That is a matter of general law and it is obviously a question of fact in most cases as to whether the notice was such as to reach the legal entity known as the firm. Here it was addressed to one of the partners and by the ordinary law and the specific provision of section 63 (2) of this very Act each partner is an agent for all the others in the firm. The question must be answered in this way. The assessee must pay the costs of this reference, Rs. 150 (Rupees one hundred and fifty).

KRISHNAN J.—I agree to the answer proposed by the learned Chief Justice. The question put to us by the referring authorities is whether in the case of an unregistered firm a notice under section 23 (2) of the Income-tax Act should be served only on the member of the firm who made the return or whether under section 63 (2) of the Act it can be served on any member of the firm. There can be no doubt about the answer and it must be in the affirmative. Notice can be served on any member as provided for in section 63 (2) and such service is good service. The word 'person' as pointed out by the referring officer, clearly includes a firm as provided by the General Clauses Act, 1897; and when the return is made on behalf of the firm by a partner, it is the firm that is the person who makes the return and any proper service on the firm as authorised by section 63 (2) will be a proper service.

I agree to the order proposed as to costs.

[113] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Walsh and Mr. Justice Sulaiman.

[16th March, 1925.]

Messrs. Begg Sutherland and Company, Ltd. ...

*Assessees**

v.

Commissioner of Income-tax, United Provinces ...

Referring Officer.

Income-tax Act (XI of 1922). Secs. 3 and 26—Registered firm converted into limited company—Effect of conversion—Profits made before conversion—Liability of company for income-tax and super-tax thereon—Assessment, how to be made.

* (1925) I. L. R. 47 All. 715; 23 A. I. J. 685; 6 L. R. A. Civ. 333; A. I. R. (1925) All. 535; 88 Ind. Cas. 239.

Where a registered firm is converted into a limited company, the conversion does not affect the legal liability to tax which already existed before conversion and the profits of any period anterior to conversion not assessed to income-tax are liable to be assessed as the profits of the firm but the new company is liable for the payment of the tax. The effect of conversion is to cause the company to step into the shoes of the defunct firm as assessee for the period of assessment and hence the new company cannot be assessed to super-tax in respect of any period for which the firm, its predecessor, would not have been liable to pay if it had continued in existence.

Under the scheme of the Income-tax Act, the liability to assessment is not conclusive as to the chargeability in respect of the period for which such assessment is made.

Case [Civil Miscellaneous No. 123 of 1925] stated under section 66 (1) of the Income-tax Act, XI of 1922.

CASE.

This case is referred for the decision of the High Court under sub-section (1) of section 66 of the Indian Income-tax Act, 1922.

2. The firm of Messrs. Begg Sutherland and Co., Cawnpore, which was registered under section 2 (14) of the Indian Income-tax Act, 1922, was converted into a private company styled Messrs. Begg Sutherland and Co., Ltd., with effect from the 1st May, 1922, the firm ceasing to carry on business as on and from the 30th of April, 1922.

3. The accounting period of the firm ran from the 1st of May to 30th of April, but on the formation of the company the directors decided that the accounting period should coincide with the Government financial year, the first of such periods consisting of 11 months only, i. e., 1st of May, 1922 to 31st of March, 1923.

4. The assessment in the year 1922-23 was made on the profits of the firm for the year ended 30th of April, 1921 and the firm was assessed to income-tax at the maximum rate and the individual partners were assessed to super-tax on the shares of their profits in the firm, at the rates appropriate to those shares, made by the firm during the period 1st of May, 1920, to 30th of April, 1921.

5. When the assessment of the concern was made in the year 1923-24 it was dealt with in two portions—

(1) as regards the profits which arose to the firm in the accounting period 1st of May, 1921 to 30th of April, 1922, and

(2) as regards the profits of the company in the period from the 1st of May, 1922 to the 31st of March, 1923.

6. In the financial year 1923-24 the profits of the firm were assessed to income-tax at the maximum rate and the individual partners were assessed to super-tax on the shares of their profits in the firm at the rates appropriate to those shares on the profits made by the firm during the period 1st of May, 1921, to 30th of April, 1922, and in the same year the profits of the company were also assessed to income-tax at the rate of $1\frac{1}{2}$ annas in the rupee and were also charged to super-tax at the rate payable by a company for the 11 months ending 31st of March, 1923. The company was further held responsible under the provisions of section 26 of the Indian Income-tax Act, 1922, for the payment of the demand of the income-tax assessed on the profits of the firm for the period 1st of May, 1921 to 30th April, 1922, mentioned and this demand together with the demand for income-tax and super-tax charged on the profits of the second of the two periods (i. e., 1st of May, 1922, to 31st of March, 1923), was duly paid by the company.

7. The assessment, however, which was made by the Income-tax Officer was not correct. Section 26 of the Indian Income-tax Act provides that where

any person [a term which includes a company under the provisions of section 3 (39) of the General Clauses Act] succeeds to any business, the assessment shall be made on the person engaged in the business at the time of making the assessment. The Income-tax Officer, therefore, should have treated the assessment as made on the company which was in existence at the time of the assessment and should accordingly have brought under assessment all the profits which were assessed at the time as if the company had earned them. That is to say, the company should have been assessed to super-tax at the rate of one anna in the rupee on the profits which arose in the period the 1st of May, 1921 to 30th of April, 1922, in addition to super-tax which was levied from the partners of the late firm on the income which they had actually received from the firm. The question of income-tax, it may be noted, does not arise as that tax was charged at the maximum rate. The company, therefore, has been called on to show cause why the Commissioner of Income-tax should not exercise his power under section 33 of the Act and assess the profits of the first of the two periods to super-tax.

8. Two representatives of the company have appeared before the Commissioner and have urged that the company is not liable at all to taxation on any of the profits made by the firm and that the company was not liable in respect of the assessments already made on the firm and is also not liable to a further assessment, on the following grounds :—

(1) That the Company did not carry on any business during the year ending 30th of April, 1922, nor did any income, profits or gains accrue to the company during the period.

(2) That the sum upon which the company has been assessed to super-tax and the income-tax which it has already paid for the periods in question in fact form no part of the company's income, profits or gains for the year ending 30th of April, 1922, or at all.

(3) . That the company is not the successor in the business of Messrs. Begg Sutherland & Co., within the meaning of section 26 of the Indian Income-tax Act, 1922.

(4) Alternatively, if the company is the successor to the business of Messrs. Begg Sutherland & Co., within the meaning of section 26, which the company does not admit, the company had no income, profits or gains, prior to the 1st of May, 1922, upon which either income-tax or super-tax can be charged under the said Act for the financial year 1923-24.

(5) That the Income-tax Act, 1922, provides for the taxation of a person either directly or through his agent in respect of his own income, profits and gains only ; there is no provision in the Act which makes a person liable to taxation in respect of income, profits or gains to which he is an entire stranger.

(6) The procedure which is proposed involves double taxation of the same income. There is no provision in the Act for such a double assessment and in accordance with the general principle affecting the interpretation of taxing statutes, nothing should be brought under charge for which a specific provision is not made in the Act.

(7) Section 26 is not a charging section.

9. The Commissioner of Income-tax is not prepared at this stage to consider any points which do not arise out of his order of the 10th of November, 1924. But regarding those points, as the case is being taken in review and as no reference lies to the High Court from an order in review and as the problem is one of considerable difficulty, the Commissioner refers the case to the High Court under the

provisions of sub-section (1) of section 66 on the questions of law set out in the following paragraph.

10. The questions of law are :—

(1) In the circumstances of this case in which the last accounting period of the firm ended on the 30th of April, 1922, and the firm was converted into a joint stock company as from the 1st of May, 1922, and the company adopted the financial year as its accounting period, the first of such periods consisting of 11 months only—how is the assessment to be made in the year 1923-24? Are the profits for the period 1st of May, 1921 to 30th of April, 1922, to be assessed as the profits of a firm but the company to be called on to pay the amount due? Or, since when the assessment was made the assessee was a company—is the company to be assessed on the profits made by the firm in its last year, such profits being treated as the income, profits and gains of the previous year of a company?

(2) The assessment to super-tax in the present instance involves double taxation of the same income. Does the Indian Income-tax Act, 1922, provide for this?

As regards the first question, the Commissioner considers the meaning of section 26 to be that an assessee must be treated as he is found. That is to say, if, when the assessment is made, the assessee is a company, he must be treated as a company in respect of all profits on which he is liable to be assessed, and that in the case in question the company is being properly called on to pay super-tax as a company on the profits of the period the 1st of May, 1921 to 30th April, 1922.

As regards the second point, which is stated at the request of the assessee, the Commissioner is of opinion that the assessment to super-tax of the partner-share-holders is correct whether the business is treated as that of a company or that of a registered firm, and that the only matter for decision is that stated in the first question.

J. M. Banerji, for the assesseees.

Lalit Mohan Banerji, Government Advocate, for the Crown.

JUDGMENT.

This is a reference, or a case stated, under section 66 of the Indian Income-tax Act of 1922, by the Commissioner of Income-tax for the opinion of the High Court. The facts are very clearly stated in the case and are as follows :—

The business of the well-known firm of Begg Sutherland & Co., Cawnpore, was carried on by a firm which consisted of certain individual partners under the title of Messrs. Begg Sutherland & Co., up to the 30th of April, 1922. On that date that firm, as a commercial or legal person, ceased to exist, and was succeeded by a private limited company which was known by the same name with the addition of the word "limited." The agreement is not exhibited, but the point taken at one time on behalf of the company by one of its representatives before the Commissioner, that the company was not the successor of the firm within the meaning of section 26 of the Income-tax Act, has not been argued by Mr. J. M. Banerji on behalf of the company and, therefore, it must be taken to be admitted that it is, no doubt because it could not be reasonably contested. In a company of this prosperity, making profits at a rate which involved them in liability for super-tax, some slight complications necessarily arose by reason of the conversion, for this reason. Under section 2, sub-section (14), a firm may take advantage of a provision therein contained for registering itself, and where it does so, by operation of section 55, the firm, being from that moment a registered firm, is not liable for

super-tax. In other words, where a registered firm exists, it is not liable for super-tax on the whole of its profits made as such firm, but the individual partners are liable for super-tax, if they would be liable for such super-tax as individuals. On the other hand, if the firm is an unregistered firm, then it is directly chargeable with super-tax if it makes profits at a rate sufficient to create liability for super-tax, and in that event the partners are not chargeable for super-tax if their firm has already paid it. The date of the conversion of the firm into a company, and the date of their annual accounting did not correspond with the dates adopted as the termini of the financial year by the income-tax authorities. There was, therefore, a broken period to be dealt with and a broken continuity to be dealt after the date of the conversion, and for reasons best known to themselves, by mutual consent, the income-tax authorities and the new company dealt with the profits in respect of which income-tax was payable from 1921-1922 and from 1922-1923 in one year of assessment, namely, 1923-24. There was no attempt to shirk any liability, or to dispute the facts as they were. In the result the profits which the firm had in fact made during the last year of its existence were assessed at the maximum rate for income-tax. In addition the individual partners were, in accordance with the law which we have just described, assessed to super-tax on their shares of the profits, the firm as a registered one being exempt from super-tax. In addition, for the first eleven months of the existence of the company which brought the assessment up to the 31st of March, 1923,—thereby making the company's accounting year co-terminous with the financial year of the income-tax authorities—the new company was assessed in income-tax and also charged super-tax at the rate payable by a company. It is not contended on the part of the income-tax authorities that in the ordinary use of language, unless there is some special provision in the Income-tax Act by which they are caught, the new company and the old firm had not discharged in every way their legal liability, or what might be supposed to be their legal liability up to 31st of March, 1923. But the case raises the further question whether the company is to be assessed in respect of the last year of existence of the firm, not merely on what was undoubtedly payable by law by the company on the profits which the firm had made and on which it would have been assessed if it had continued to exist as a firm, but whether it is not also liable to be treated as a super-tax paying person, because although its predecessor was not a super-tax paying person, it itself is by the express language of the Act, and must be treated as what it is, even in respect of profits made anterior to its existence. We can only say that the proposition is sufficiently startling to cause surprise and to lead one to look for language absolutely unambiguous and positive in its terms to create a special liability of that sort, which it would be unlikely that any legislature would intend to impose if it really understood what it was doing. The only argument submitted to us by the Government Advocate on behalf of the income-tax authorities, is suggested by section 26. But it certainly cannot be said that section 26 contains any express provision upon the point, and the answer to the argument on behalf of the Income-tax Commissioner really is that the conversion of the firm into the company does not in any way affect the profits made by the firm before the conversion, or the legal liability to income-tax which already existed before the conversion. All that the conversion effects is to cause the company to step into the shoes of the defunct firm as assessee for the period of assessment, but it goes without saying, and is recognized throughout the scheme contained in the Act, that the liability to assessment is not conclusive as to the chargeability in respect of the period for which such assessment is made. To make the matter clear—if it is desirable further to do so—it is only necessary to point out that section 26 provides that where any change in the ownership of business is made, the assessment shall be made on the owner at the time of making the assessment. But the assessment has to relate to periodical profits made as defined in the Act, and section 3 provides that income-tax shall be charged

for any year in respect of all profits of the previous year of every firm. What, therefore, was to be assessed, amongst other things, upon the new company after the conversion in pursuance of the arrangements come to, to which we have already referred, were the profits, and the income-tax payable thereon as provided by law, of the year previous to the conversion. Those profits admittedly did not include a super-tax, and there is nothing in the Act which would justify the income-tax authorities in imposing on a successor during the first year of assessment after the conversion a liability in respect of its predecessor which its predecessor would not have been liable to pay if it had continued in existence without any conversion.

Our answer, therefore, to the first question is that the profits for the period 1st of May, 1921, to 30th of April, 1922, are to be assessed as profits of a firm, but the company is to be called upon to pay the amount, which we understand they have done.

To the second question, to avoid ambiguity, we would say that there is nothing in the Income-tax Act of 1922 which makes a new company liable to pay super-tax in respect of a year for which its predecessor was not liable for super-tax.

We think that this is a case which required careful handling and that the maximum fees should be payable on either side. We, therefore, direct the Government to pay Rs. 200, the costs of the other side, and we certify that that is a reasonable amount for the Government Advocate.

[114] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Walsh and Mr. Justice Mukerji.

[26th March 1925]

Lachhman Das, Babu Ram of Cawnpore

... *Assessee*.*

v.

Commissioner of Income-tax, United Provinces

... *Referring Officer.*

Income-tax Act (XI of 1922), Secs. 64 (1) and (4)—Income-tax Officer, jurisdiction of—Assessment of income of principal place of business as well as branches—Reasonable opportunity for production of accounts by assessee—Cause for non-production, sufficiency of.

The assessee with his principal place of business at Cawnpore had branches in Bombay, Karachi and Calcutta. For assessment purposes, the Income-tax Officer, Cawnpore, received reports from Income-tax Officers at Bombay and Karachi of the estimated profits of the assessee in those places and was informed by the Income-tax Officer at Calcutta that he was unable to report any estimate of profits there; as the books of account of the Calcutta branch were, as alleged by the assessee, at Cawnpore and would be duly produced before the Officer there. In compliance with a notice under Sec. 22 (4) by the Income-tax Officer, Cawnpore, for production of the Cawnpore account books as well as the branch accounts, the books relating to Cawnpore alone were produced. A second notice under Sec. 22 (4) was issued and the assessee was also called upon under Sec. 23 (3) to deal with certain ambiguities affecting the accounts of the principal place of business as well as the branches. Later, the assessee was called upon under Sec. 22 (4) to produce Cawnpore accounts for a specified period to clear up further doubtful points. After getting a further extension of time therefor, the assessee expressed inability to comply with the notices on the ground of inconvenience in producing Calcutta accounts in Cawnpore and applied for a reference to the Officer at Calcutta for examination of the accounts of that branch there. Thereupon the Income-tax Officer, Cawnpore, framed an assessment under Sec. 23 (4).

* (1925) I. L. R. 47 All. 631; 23 A. L. J. 379; 6 L. R. A. Civ. 325; A. I. R. (1925) All. 385; 88 Ind. Cas. 216 (2).

Held, that on the facts stated, a reasonable opportunity was given to the assessee to produce the accounts of the Calcutta branch first in Calcutta, and secondly in Cawnpore when the Income-tax Officer of Calcutta was led to believe that the books were available in the latter place, (2) that on the evidence stated, the assessee was not prevented by sufficient cause from producing the books in Cawnpore, and, (3) that under Sec. 64 (1) read with sub-section (4) the jurisdiction of the Income-tax Officer of Cawnpore was not ousted but was concurrent in respect of the assessment of the profits of the branches and the proceedings relating thereto.

Case [Civil Miscellaneous No. 164 of 1925] stated under section 66 (2) of the Income-tax Act, XI of 1922, by D. M. Stewart, Esq., Commissioner of Income-tax, United Provinces, as per his letter No. 2246/I. T. dated the 18th/19th March, 1925.

CASE.

This is a demand for a reference to the High Court under section 66 (2) of the Indian Income-tax Act, 1922, made by Lachhman Das, Babu Ram of Cawnpore.

2. The principal place of business of the assessee is in Cawnpore but there are also branches in Bombay, Karachi, and Calcutta. When the assessment for the financial year 1924-25 came to be made, the Income-tax Officer, Cawnpore, received reports from the Income-tax Officers of Bombay and Karachi containing an estimate of the profits of the assessee in those places. The Income-tax Officer in Calcutta, however, who had been requested to report the profits of the Calcutta branch after examining the firm's accounts replied that according to the assessee's allegation the books relating to the branch business in Calcutta were at Cawnpore and would be duly produced before the Income-tax Officer; he accordingly reported no estimate of the profits. On the 24th July, 1924, the Income-tax Officer, Cawnpore, issued a notice under section 22 (4) for the production, on the 3rd September, 1924, of the books not only of the principal place of business in Cawnpore but also of the several branches. The books relating to Cawnpore alone were produced on that date and a second notice under section 22 (4) was issued, while further the assessee was requested, under the provisions of section 23 (3), to deal with certain ambiguities affecting the accounts of the principal place of business and the branches in Bombay and Calcutta. On the 4th September, 1924, the assessee was further called on under section 22 (4) to produce the accounts of the Cawnpore business for the years Sambat 1977-78 in order to clear up further doubtful points, the date fixed being 30th September, 1924. On that date the assessee asked for an extension of time and was granted up to the 22nd October, 1924. The case was not decided on that date in the absence of proper authority for his representative from the owner of the business and the case was accordingly disposed of on the 23rd October, 1924. The representative when asked why the books of the Calcutta branch were not produced replied that it was most inconvenient that the Calcutta accounts should be produced in Cawnpore and that he was therefore unable to do so. An application was also presented asking that the case might be referred to the Income-tax Officer, Calcutta, for the examination of the accounts of that branch. The Income-tax Officer, considering the delay which had taken place and the failure of the assessee to produce his accounts before the Calcutta Income-tax authorities in the first instance, refused the request. On this ground, and also because the assessee did not produce the books of the principal place of business for Sambat 1977-78, he proceeded to frame an assessment under section 23 (4).

3. On the 24th November, 1924, the assessee presented to the Income-tax Officer, Cawnpore, an application under section 27 of the Indian Income-tax Act, 1922, praying "that the assessment as it stands be cancelled and it be sent to the Income-tax Officer of Calcutta to report the income of that branch." The grounds given in support of the application are contained in the petition.

4. The Income-tax Officer did not consider that the assessee had proved his case and rejected the application. It will be noted that the assessee does not refer to the application of section 23 (4) to the assessment which was involved by his failure to produce the Cawnpore books relating to Sambat 1977-78. The Income-tax Officer also in his order does not refer to this point.

5. The assessee filed an appeal before the Assistant Commissioner of Income-tax.

6. The Assistant Commissioner, after hearing arguments, held that the contention of the appellant was in effect not that he had been prevented by any reasonable cause from complying with the notice under section 22 (4) but that the Income-tax Officer had no jurisdiction and that the assessment was illegal. He refused to accept this interpretation of the law and rejected the appeal.

7. The assessee now desires a reference to be made to the High Court on the following questions of law:—

“(1) Whether the Income-tax Officer of Cawnpore, in face of the provisions laid down under section 64 (4) and under notes and instructions, has any jurisdiction to issue a notice under section 22 (4) for the account-books of the branch shops situate at Bombay, Calcutta and Karachi.

“(2) Whether the provisions laid down under section 64 (1) empower an Income-tax Officer of one area in one province to issue notices under section 22 (4), etc., and to make an estimate of the income of branch shops situate in a different area and in a different province altogether.

“(3) Whether the Assessing Officer of the principal place of business can compel the production of the branch accounts before him and him alone.

“(4) Whether the rejection of the petitioner's application regarding the examination of the branch books at the branches was legal.

“(5) Whether there is any evidence to support the finding of the Income-tax Officer of Cawnpore regarding the income of the Calcutta branch.

“(6) Whether the assessment, as made, is *arbitrary or to the best of his judgment* as laid down under section 23 (4).

“(7) Whether the Income-tax Officer of Cawnpore or that of Calcutta alone is empowered to estimate the income of the Calcutta branch; and

“(8) Whether the assessment, made under section 23 (4) by the Income-tax Officer of Cawnpore on account of the non-production of the books of the Calcutta branch alone, is legal.”

In accordance with his previous action he does not refer to the applicability of section 23 (4) involved by his failure to produce the accounts of Sambat 1977-78 for Cawnpore.

8. A copy of the above statement of the facts was supplied to the assessee who was also informed that the only points of law which, in the opinion of the Commissioner, could arise and which he proposed to refer for the decision of the High Court were—

(i) Was the opportunity given to the assessee to produce certain accounts, and in particular the accounts of the Calcutta branch, reasonable? and

(ii) Was the assessee prevented by sufficient cause from producing those books?

The assessee in a letter written by his advocate has replied that his “main legal contention” has not been referred to the High Court, viz., that “the Income-

tax Officer of Cawnpore in face of the provision laid down under section 64 (4) and under notes and instructions had no jurisdiction to issue a notice under section 22 (4) for the account books of the branch shops at Bombay, Calcutta and Karachi and to make an estimate of the income of branch shops situate in a different area and in a different province altogether." The Commissioner is of opinion that this point does not arise out of an appellate order relating to section 27 but as the assessee clearly feels aggrieved over the action taken by the Income-tax Officer and as the question is one of some importance, the Commissioner has decided to submit a reference under sub-section (1) of section 66 of the Indian Income-tax Act, 1922, on the following point also.

Do the provisions of sub-section (4) of section 64 of the Indian Income-tax Act oust the jurisdiction of the Income-tax Officer of the area in which a principal place of business is situated so far as the *assessment* of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned?

9. There are thus three points of law which are submitted for the opinion of the High Court—

(i) On the facts stated was the opportunity given to the assessee to produce certain accounts, and in particular the accounts of the Calcutta branch, reasonable?

(ii) Was the assessee prevented by sufficient cause from producing those books? and

(iii) Do the provisions of sub-section (4) of section 64 of the Indian Income-tax Act oust the jurisdiction of the Income-tax Officer of the area in which a principal place of business is situated so far as the assessment of the profits or gains of a branch business situated in another area and proceedings relating thereto are concerned?

As regards the first question the Commissioner is of opinion that as the period which was given for the production of accounts was a long one it cannot be said that the assessee had no reasonable opportunity to comply with the notice. The Commissioner is also of opinion that the assessee was not prevented by sufficient cause from complying with the notice. He failed to do so on the ground that he was not obliged to do so. The word "prevent" in section 27 involves some definite active cause, making compliance with the order impossible, and not a passive cause such as the opinion that compliance is not obligatory because of rights supposed to be secured under the Act.

On the third question the answer is, in the opinion of the Commissioner, clearly in the negative.

The Commissioner would add that the present proceedings will be sterile: the assessment under section 23 (4) must in any case stand because the failure to produce the Cawnpore accounts for Sambat 1977-78 makes that sub-section applicable.

Dr. Kailas Nath Katju and Uma Shankar Bajpai, for the assessee.

Lalit Mohan Banerji, for the Crown.

JUDGMENT.

The answers to the three points submitted to us are as follows:—

On the facts stated, a reasonable opportunity was given to the assessee to produce the accounts of the Calcutta Branch, first in Calcutta, secondly in Cawn-

pore, where the Income-tax Officer of Calcutta was led to believe that the books were available.

Secondly, on the evidence stated the assessee was not prevented by sufficient cause from producing the books in Cawnpore.

Thirdly, in our opinion the jurisdiction of the Income-tax Officer of the area in which the principal place of business is situated is not ousted. The jurisdiction is concurrent. Under section 64, sub-section 1, the Income-tax Officer of the principal place of business has the duty of assessing the whole of the income derived from the principal place of business as well as the various branches. By sub-section 4, every Income-tax Officer has also jurisdiction to exercise the powers of an Income-tax Officer with regard to the profits arising in that area.

It is of course understood, and ought to be understood, by the authorities that the Income-tax Officer of the principal place of business will not exercise his powers oppressively so that persons willing to submit to the requirements of the Income-tax Officer of the particular area in which the branch is situated should not be deprived of an opportunity of supplying him with all proper materials, but exceptional cases may require exceptional remedies.

We allow the fee of Rs. 150 payable to the Government Advocate. As Mr. L. M. Banerji will no longer be Government Advocate when the certificate will be filed, we authorise it to be filed by his clerk.

[115] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Sydney Robinson, Kt., Chief Justice and Mr. Justice U Ba.

[31st March, 1925.]

Sin Seng Hin and one

v.

Commissioner of Income-tax, Burma

Assessee*

Income-tax Act (XI of 1922), Secs. 33 and 66 (1) and (2)—Assessment enhanced by Commissioner acting under Sec. 33—Application to state a case, if lies.

Where the Commissioner of Income-tax in exercise of the powers under Sec. 33 of the Income-tax Act enhanced the assessment and the assessee thereupon under Sec. 66 (2) of the Act applied for a reference which was refused by the Commissioner on the grounds that there was no question of law and that there was no provision therefor in respect of orders under Sec. 33.

Held, that the High Court has no power to compel the Commissioner to state a case, as the jurisdiction under Sec. 66 (3) is confined to applications under Sec. 66 (2) in respect of orders under Secs. 31 and 32 of the Act.

Civil Miscellaneous Application No. 15 of 1925 under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Burma, to state a case for the decision of the High Court.

Patkar, for the assessee.

Higginbotham, for the Crown.

JUDGMENT.

ROBINSON C. J.—After the Assistant Commissioner had passed an order with reference to the assessment of the petitioners the Commissioner took up

* (1925) 4 Bur. L. J. 102; A. I. R. (1925) Rang. 252; 89 Ind. Cas. 785 (r).

the case on review in exercise of the powers conferred by section 33 of the Act. The order of Assistant Commissioner had been in the petitioner's favour but the order of the Commissioner enhanced the assessment considerably.

Petitioner then moved the Commissioner to state a case. This application purported to be under section 66 (2) of the Act. The Commissioner refused the application on two grounds: he held that there was no question of law arising and further that the Act did not allow of an application in respect of an order passed under section 33.

We are moved to compel the Commissioner to state a case.

In the first place the Commissioner could no doubt have stated a case under section 66 (1) of his own motion had he seen fit to do so. He considered the point, but holding as he did that no question of law arose he decided he could not exercise that power. There is no provision permitting an assessee to move the Commissioner to act under section 66 (1).

In the next place it is to be noted that section 66 (2) refers in express terms to applications in respect of orders under section 31 or section 32 and omits all reference to orders under section 33. The proviso shows that section 33 was not overlooked.

Next section 66 (3) only permits an assessee to move the High Court in the case of an application under sub-section (2). Throughout, sections 31 and 32 are mentioned and section 33 is omitted.

The right to require a reference or to move the High Court to compel a reference cannot exist without an express provision conferring that right. There is no such provision and the application is therefore rejected with costs. Advocate's fees, three gold mohurs.

[116] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Victor Murray Coutts Trotter, Kt., Chief Justice

and Mr. Justice Krishnan.

[1st April, 1925.]

Siva Pratap Bhattadu and another

... *Appellants.*

v.

The Commissioner of Income-tax, Madras

... *Respondent.*

Income-tax Act (XI of 1922), Secs. 23, 27 and 66—Assessee called on to produce accounts—Failure to produce—Sufficiency of cause for failure—If a question of law—Application to High Court for reference.

The assessee, whose return of income was not accepted by the Income-tax Officer, was called upon under Sec. 23 (2) to produce his accounts and though granted two extensions of time therefor, did not produce the accounts but asked for further time. The Income-tax Officer refused the further extension and under Sec. 23 (4) framed an assessment on an estimated income. An application by the assessee under Sec. 27 to re-open the assessment was refused by the Income-tax Officer who held that there was no sufficient cause for non-production of accounts in time. The assessee thereupon moved the High Court requiring the Commissioner to state a case on the question of sufficiency of cause for failure to produce accounts, and the application was refused by the Judge on the Original Side. On appeal,

Held, that the application for a reference was rightly dismissed.

Per Coutts Trotter C. J.—The question whether the assessee had given sufficient grounds for excusing his delay in producing his accounts is essentially one of fact and where there are materials upon which the Income-tax Officer could come to the conclusion to which he did, the matter is solely for him.

Per Krishnan J.—The discretion of the Income-tax Officer under Sec. 27 of the Act in deciding as to sufficiency of cause has to be exercised judicially and is controllable by the appellate authority. The question is one of law and though it may be open to the High Court to direct a reference on this question, it will not do so unless the discretion was exercised illegally or improperly so as to justify interference by a second appellate authority.

Appeal [O. S. A. No. 43 of 1924] from the judgment of the Hon'ble Mr. Justice Kumaraswami Sastri, dated the 7th March, 1924, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, and reported in 1 I. T. C. 323.

Nugent Grant, Counsel for the appellant.

C. V. Anantakrishna Ayyar, Government Pleader, for the Crown.

JUDGMENT.

COUTTS TROTTER C. J.—The learned Judge below has held that no point of law arose on this reference and in my opinion he was right. The sole question which the Income-tax Officer of Godavari had to decide was whether the assessee had given sufficient grounds for excusing his delay in producing his accounts; and that was essentially a question of fact. If he had materials before him on which he could come to the conclusion to which he did come the matter is solely for him. It is impossible to argue that he had no such materials before him and that being so no point arises for our determination or answer.

The appeal must be dismissed with costs.

KRISHNAN J.—This is an appeal under the Letters Patent against an order passed by Kumaraswami Sastri, J. refusing to direct the Income-tax Commissioner to make a reference to the Court as prayed for by the assessees.

The assessees are a firm of merchants carrying on business in Rajahmundry through a resident agent with power of attorney named Sheo Narain. They were called upon to make a return of their income and they submitted one showing a loss of Rs. 5,652-6-9. The Income-tax Officer of Godavari not being satisfied with the correctness of the return called upon the assessees under section 23, cl. (2) of the Act to produce their accounts on 5th January, 1923. Accounts were not produced but an application for extension of time was made. Time was given till 20th January with a warning that no further time would be given. Nevertheless the accounts were not produced but the agent sent a telegram from Bombay to the Income-tax Officer to say that he could not reach Rajahmundry in time and asked for a further extension. Time was again granted till the 1st of February. He again failed to produce the accounts and wanted further time on the ground that the accounts had not been completely written up. The patience of the Income-tax Officer was apparently exhausted by then and he refused to give further time and proceeded to act under section 23, cl. 4, and assessed the assessees on an estimated income of Rs. 71,500.

Thereupon an application was made under section 27 to the Income-tax Officer to re-open the assessment. For that relief the assessees had to show that they had sufficient cause for failing to produce their accounts in time. The excuse stated was that before the 1st of February, the due date for the production of accounts, the grandson of one of the principals who are residents of Marwar and who had come on a visit to Rajahmundry was taken dangerously ill with enteric fever and double pneumonia of which disease he died on 28th February, that the agent Sheo Narain having constantly to attend on the boy had no time or peace of mind to attend to business and prepare the accounts or to explain the return to the Income-tax Officer and that as he was the only man in the firm in Rajahmundry who understood Marwari accounts it was of no use to send the books to the Officer and hence the failure to comply with the order to produce the books by the 1st of February.

The Income-tax Officer rejected this application on wrong grounds, but on appeal to the Commissioner his order was set aside and he was directed to consider the application on its merits. There was a question raised at the hearing whether this order meant that the assessment should be re-opened and the accounts taken. It is, however, clear from the nature of the application and the circumstances of the case that the Commissioner did not mean to excuse the delay but only directed the application for it to be considered on the facts. This was how all the parties understood him and I think rightly.

When the case went back to the Income-tax Officer he again refused to excuse the delay as he considered sufficient cause was not shown. It is true he did not take any evidence of the allegations in the assessee's petition as to the failure to comply in time with the order to produce the accounts. It must therefore be taken that the allegations by Sheo Narain were accepted as true and correct. An appeal to the Commissioner against the order of the Income-tax Officer also failed. Hence this application has been made to this Court under section 66 of the Act to direct the Commissioner to state a case on the following points :—

1. Whether the facts alleged do not constitute "sufficient cause" within the meaning of section 27 ;
2. Whether it was open to the Commissioner without any evidence to arrive at a finding of wilful default on the assessee's part ;
3. Whether the Commissioner should not have confined himself to the failure on the last date, 1st February, 1923, in considering whether there was sufficient cause and not taken into consideration the previous adjournments.

A further question was raised whether super-tax was properly levied when the assessed income was only Rs. 71,500 and the assessee was members of a joint Hindu family, but this question was not argued before us and need not be dealt with.

The first three questions submitted all turn upon whether there was sufficient cause to excuse the failure to produce the accounts in time. It was argued by Mr. Grant that this was a question of law and that it was open to us to direct a reference about it. It is no doubt a matter of the exercise of his discretion by the Income-tax Officer under section 27 in deciding whether sufficient cause had been shown ; but that discretion has to be exercised judicially and is controllable by the appellate authority. The question therefore is, I think, one of law and it has been so held with reference to interference in Second Appeal on such a question. See *Kichilappa Naicker v. Ramanujam Pillai* (1) ; *Bechi v. Ashanulla Khan* (2) ; and *Parvati v. Ganapati* (3). These cases also lay down to what extent and in what circumstances a discretion like the one in question here exercised by one authority can be interfered with by a higher authority. Though it may be open to this Court to direct a reference on the question raised it will not do so unless the circumstances justify an interference with the discretion exercised by the Income-tax authorities. I am not prepared to say that in this case that discretion was exercised either illegally or improperly so as to justify interference as laid down in the authorities stated above. I am therefore of opinion that this application to the Court was rightly dismissed.

A point was taken that no Letters Patent Appeal lay in this case but it is not necessary to decide it in the view I take of the case. I may however observe that the ruling of the Calcutta Court in L. P. A. No. 1 of 1924, *Probat Chandra Barua v. The King Emperor* (4) brought to our notice after the hearing is not exactly in point as the appeal there was against the order made on the reference, whereas here it is against the order made on the application for a reference and the two do not stand on the same footing. I would dismiss this appeal with costs.

(1) (1902) 25 Mad. 166.

(3) (1899) I. L. R. 23 Bom. 513.

(2) (1890) I. L. R. 12 All. 461.

(4) 1 I. T. C. 414.

[117] IN THE COURT OF THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.

Before Mr. P. S. Kotval, Additional Judicial Commissioner.

[8th April, 1925.]

Hussainbhai Bohari

...

*Assessee**

v.

The Commissioner of Income-tax, Central Provinces and Berar.

Income-tax Act (XI of 1922), Sec. 2 (14) and Rules 4-6—Application for renewal of registration before April—Registration granted for succeeding year—If legal—Rules 5 and 6, scope of.

Where a firm, registered in the previous year, applied for and was granted on 16th December, 1922, a certificate of registration by the Income-tax Officer, who added at the end of the certificate "This certificate of registration has effect from 1st April, 1923," and the firm was assessed to super-tax for the year 1923-24,

Held, that the assessee was a registered firm within the meaning of Sec. 2 (14) of the Act for the year 1923-24 and hence not assessable to super-tax.

The presentation of the application for registration before the commencement of the year for which registration is applied for is not improper and the effect of Rr. 5 and 6 of the Income-tax Rules, is not to render void a certificate of registration for the succeeding year granted before the month of April on an application made before that month.

Case [Miscellaneous Judicial Case No. 4-B of 1925] referred for the decision of the Court in compliance with order of Court dated 15th November, 1924 in Miscellaneous Judicial Case No. 61-B of 1924.

CASE.

The firm of Jafferji Hiptullabhai of Amraoti had filed an application under section 2 (14) of the Indian Income-tax Act, 1922, dated the 11th December, 1922, before the Income-tax Officer at Amraoti on the 16th of December, 1922, and the firm was also registered on the same date. At the end of the certificate of registration, the Income-tax Officer has said "This certificate of registration has effect from the 1st of April, 1923."

2. For assessment during the year 1923-24, the firm returned an income of Rs. 63,509-11-6. The Assistant Commissioner who alone has orders to assess cases of incomes of Rs. 40,000 and above, determined the total income at Rs. 68,372 and imposed a tax of Rs. 6,409-14-0 and a super-tax of Rs. 1,148-4-0. This order of assessment was passed on the 11th of December, 1923. The assessee had objected that as the firm was registered it was not liable to super-tax, but the Assistant Commissioner did not allow this objection on the ground that the registration was not applied for, for the account year. In fact what the Assistant Commissioner meant was that registration to have effect in the assessment of 1923-24 should have been applied for and sanctioned after the 1st of April, 1923 and that as it was made before the 31st March, 1923, it ceased to have effect after that date (*vide* rule 6 of the Income-tax Rules.).

3. Against this assessment appeal was filed before my predecessor on the same ground, i. e., that the firm was a registered one and super-tax be not imposed, but that too was refused. Then an application under section 66 (2) for reference to the High Court was made to me in which no less than six points were asked to be referred to the High Court. These points were more or less arguments in

*A. I. R. (1925) Nag. 415; 89 Ind. Cas. 92.

favour of the appellant and referred to no particular point of law arising out of the case. Under my order of the 22nd May, 1924, I held that the case did not involve any point of law and I refused to refer the matter to the High Court. Since then an application was made to the High Court and under order, dated the 15th November, 1924, passed in Miscellaneous Judicial Case No. 61-B of 1924, I am asked to state the case and refer it to the High Court. Hence the above statement of the case.

4. The point of law that now seems to be involved is as given in the application filed by the assessee before the High Court, i. e., "Whether the applicant was a registered firm within the meaning of section 2 (14) of the Income-tax Act for the year 1923-24 though the application was made before the 1st of April, 1923 and was registered on the 16th December, 1922, with the addition of the words 'The certificate of registration has effect from the 1st of April, 1923'."

5. I am of opinion that the firm cannot be called a registered firm within the meaning of section 2 (14) of the Income-tax Act for assessment during the year 1923-24 for the following reasons:—

(1) To be called a registered firm, a firm has to be registered with the Income-tax Officer in the prescribed manner, section 2 (14). This manner is prescribed by rules 3, 4, 5, etc. Rules 5 and 6 state that the certificate of registration shall have effect from the date of the registration up to the financial year in which it is granted. In the present case the certificate of registration was granted on the 16th December, 1922 and under rule 5 it took effect from that date and under rule 6 it ceased to have effect after the 31st of March, 1923. The applicant's contention as regards the old practice cannot hold good as no practice against law can be cited as a precedent.

(2) Under *Central Provinces Gazette* Notification No. 9, dated the 5th May, 1922, published at page 102 of the *Central Provinces Gazette*, Part II, dated the 13th May, 1922, it is clearly said that in all cases where the total assessable income is Rs. 40,000 and above, the powers of Income-tax Officer shall be exercised by the Assistant Commissioner. Thus as this case was one where the income was over Rs. 40,000 the registration in this case too should have been made by the Assistant Commissioner, *vide* remarks of the learned Judges of the High Court in Allahabad in the case of *Lalla Mal Hardeo Das Cotton Spinning Mill Company of Hathras* (1). The Income-tax Officer, Amraoti, had thus acted beyond his powers in granting the certificate under question.

(3) From the application of the assessee to the High Court it seems that he doubts whether under any provisions of the Income-tax Act of 1922, he is bound to apply for the registration of the firm after the 1st of April of every taxable year. To this I would draw the attention of the learned Judges of the High Court to the remarks made by the learned Judges of the Allahabad High Court in the case cited above which clearly say: "The obvious intention of the rules as shown by the wording of the prescribed form of the certificate is that such applications should ordinarily be presented in the month of April, the first month of the financial year." In December 1922 no return of income under sub-section (2) of section 22 of the Indian Income-tax Act, XI of 1922, was even due and therefore no application for registration could be made in December 1922 to take effect in financial year 1923-24.

W. B. Pendharkar, Pleader for the assessee.

G. P. Dick, Government Advocate, for the Crown.

(1) 1 I. T. C. 266 ; 1. L. R. 46 All. 1.

ORDER.

On the 16th December, 1922, a certificate of registration under rule 4 of the rules made by the Board of Inland Revenue in exercise of the powers conferred by the Indian Income-tax Act, 1922, was granted to the firm of Jafferji Hiptullahbhai of Amraoti by the Income-tax Officer. At the end of the certificate is written "This certificate of registration has effect from the 1st day of April, 1923."

On the 11th December, 1923, the firm was assessed by the Assistant Commissioner to Rs. 6,409-14-0 income-tax and Rs. 1,148-4-0 super-tax for the year 1923-24. The firm objected to super-tax on the ground that as it was a registered firm it was not liable to super-tax. This objection was disallowed on the only ground that the assessee "did not apply for registration for the account year." The firm appealed to the Commissioner of Income-tax but the appeal was dismissed. The Commissioner held that the certificate of registration could have no effect after the 31st March, 1923. His reasons are stated as follows :—

"The Income-tax Officer had obviously made a blunder. He should have referred the appellants to submit the application after the 1st April, 1923, and told them that the registration could have effect only till the end of the financial year during which the application for registration was presented, but as observed by the learned Judges of the High Court of Allahabad in *Lalla Mal Hardeo Das Spinning Mills, In re* (1), the mere blunder of the Income-tax Officer does not convert a really unregistered firm into a registered firm if the prescribed rules are not strictly followed. Ignorance of law is no excuse and it was the business of the petitioners to acquaint themselves with the rules on the subject before presenting the application for renewal. The certificate of registration referred to by the appellants can have no effect after the 31st March, 1923. The Assistant Commissioner has therefore rightly held that the petitioners constituted an unregistered firm."

The firm then moved the Commissioner for a reference to the High Court. The Commissioner refused to state the case on the ground that no question of law had arisen. On the application of the firm to this Court the Commissioner was required to state the case and refer it. This has now been done. The question referred is stated by the Commissioner as follows :—

"The point of law that now seems to be involved is as given in the application filed by the assessee before the High Court, i. e., 'whether the applicant was a registered firm within the meaning of section 2 (14) of the Income-tax Act, for the year 1923-24 though the application was made before the 1st of April, 1923, and was registered on the 16th December, 1922, with the addition of the words 'The certificate of registration has effect from the 1st of April, 1923'.'"

The reason given by the Assistant Commissioner that the assessee did not apply for registration for the account year is incorrect. The application dated the 11th December, 1922, states "renewal for the year 1923-24 is wanted," and the certificate purports to have been granted for that year. The Commissioner however in his reference explains that what the Assistant Commissioner meant was that the registration to have effect in the assessment of 1923-24 should have been applied for and sanctioned after the 1st of April, 1923, and that as it was made before the 31st March, 1923, it ceased to have effect after that date (*vide* rule 6 of the Income-tax Rules).

The Commissioner's reasons for the finding against the firm are as follows :—

"5 (1) To be called registered firm, a firm has to be registered with the Income-tax Officer in the prescribed manner, section 2 (14). This manner is pre-

(1) 1 I. T. C. 266 ; I. L. R. 46 All. 1.

scribed by rules 3, 4, 5, etc. Rules 5 and 6 state that the certificate of registration shall have effect from the date of registration up to the end of the financial year in which it is granted. In the present case the certificate of registration was granted on the 16th December, 1922, and under rule 5 it took effect from that date and under rule 6 it ceased to have effect after the 31st of March, 1923. The applicant's contention as regards the old practice cannot hold good as no practice against law can be cited as a precedent.

"(2) Under *Central Provinces Gazette* Notification No. 9 dated the 5th May, 1922, at page 102 of the *Central Provinces Gazette*, Part II, dated the 13th May, 1922, it is clearly stated that in all the cases where the total assessable income is Rs. 40,000 and above, the powers of Income-tax Officer shall be exercised by the Assistant Commissioner. Thus as this case was one where the income was over Rs. 40,000, the registration in this case too should have been made by the Assistant Commissioner, vide remarks of the learned Judges of the High Court of Allahabad in the case of *Lalla Mal Hardeo Das Cotton Spinning Mill Company of Hathras, In re* (1). The Income-tax Officer, Amraoti, had thus acted beyond his powers in granting the certificate under question.

"(3) From the application of the assessee to the High Court it seems that he doubts whether under any provisions of the Income-tax Act of 1922 he is bound to apply for the registration of the firm after the 1st of April of every taxable year. To this I would draw the attention of the learned Judges of the High Court to the remarks made by the learned Judges of the Allahabad High Court in the case cited above which clearly say: 'The obvious intention of the rules as shown by the wording of the prescribed form of the certificate is that such application should ordinarily be presented in the month of April, the 1st month of the financial year.' In December 1922 no return of income under sub-section (2) of section 22 of the Indian Income-tax Act, XI of 1922, was even due and therefore no application for registration could be made in December 1922 to take effect in financial year 1923-24."

The question referred to the High Court is whether the certificate is effective because it was not applied for and given at the right time. Throughout the proceedings, original, appellate, or in connection with the application for reference to the High Court, there is no reference to the incompetency of the Income-tax Officer to grant the certificate and the question of such incompetency is not referred to me and I do not go into it.

I now take up the first and the third reasons. The firm had been registered in previous years and it was admitted on behalf of the Commissioner that this is a case of renewal of the certificate referred to in rule 6 of the Income-tax Rules. According to this rule the application for renewal should be made on or before the date on which the return under sub-section (2) of section 22 of the Act is due. It is admitted in this case that the return was due on or about the 3rd of June, 1923. The application was made on the 16th December, 1922, with the instrument of partnership and a copy thereof. It was thus properly made so far as the time prescribed for making it is concerned. Rule 4 provides that on the production of the instrument of partnership or its copy the certificate shall be entered in writing on the instrument or copy and prescribes that it shall be signed and dated by the Income-tax Officer. I take it that this rule applies also to the case of a renewal of a certificate. This rule was also complied with. Thus there was no infringement of any rule as to the time for applying for and renewal of the certificate. The Commissioner's reason based upon rules 5 and 6 is somewhat technical and is open to be answered by a similarly technical reason that rule 5 and the first part of rule 6 upon which he relies refer to an original grant of certificate

and not to a renewal in respect of which nothing is said as to the date from or to which it shall have effect and that therefore the duration of its effect is governed by what it itself says.

Leaving aside the technical answer and assuming that the same considerations apply to a renewal of a certificate as to an original grant of it, I think the effect of rules 5 and 6 is not to render void a certificate granted before the month of April on an application made before that month. I quite agree with the remarks of the learned Judges of the High Court of Allahabad quoted in the third reason by the Commissioner. The use by them of the word "ordinarily" is to be noted. An absolutely strict compliance with the intention of the rules, if insisted on, might lead to inconsistencies. Under rule 5 the certificate has effect from the date of registration of the firm. The granting of the certificate and the registration are effected by one and the same act of the Income-tax Officer. The form of the certificate states that it has effect from some day in April. Therefore the registration must be on some day in April. The application therefore also must be made at the latest on some day in that month. It is admitted in this case that it need not have been made in April but could have been made any time before the 3rd June, 1923, under rule 2. There will thus be an inconsistency between rule 2 and the intention of rules 5 and 6. Suppose again the application is made just before the closing time of the office on the last day in April. Is the Officer expected to register the firm and grant the certificate before the 1st of May? If it is open to the Income-tax Officer to register the certificate after the last day of April, then there will be an inconsistency between the form of the certificate and rule 5.

In my opinion the presentation of the application before April was not improper and this is now admitted on behalf of the Commissioner. After all it does not appear to be the firm's fault that the certificate was granted before and not after the month of April. There was nothing to prevent the Income-tax Officer from keeping back orders on the application till the month of April. There was no ambiguity as to what financial year the certificate was applied for and in fact it was issued for the year 1923-24. If the Income-tax Officer had postponed endorsing the certificate till the month of April, admittedly no difficulty would have arisen. I fail to see how in the face of the express statement in the certificate that it has effect from the 1st day of April 1923 it can be said that it took effect from the 16th December, 1922, and ceased to have effect after the 31st March, 1923. No effect for the period between these two dates was purported to be given to the certificate. *In the matter of Lalla Mal Hardeo Das* (1), the case referred to by the Commissioner, the facts were different as would appear from the question referred to the Court which is as follows :—

"Whether when the firm did not apply for registration as prescribed by statutory rules prior to the last day by which its return of income for the year was due, it can be held to be registered firm for the year in question by filing the application prior to the assessment."

The question was answered in the negative. It was found that there was not in existence before the date on which the return was due an instrument of partnership and the firm was not then in a position to apply for registration and that in fact it had not applied before such date. It was further found that on the day on which the assessment was made there had been in fact no certificate granted to the firm. The question arising in the present case was not decided.

My answer to the question referred to this Court is in the affirmative. The firm will get its costs of this reference. I fix the pleader's fee at Rs. 30.

(1) 1 I. T. C. 266 ; 1. L. R. 46 All. 1.

[118] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Coyajee.

[14th April, 1925.]

Amratlal K. Gandhi

... *Assessee.*

v.

Commissioner of Income-tax, Bombay

... *Referring Officer.**Income-tax Act (XI of 1922), Secs. 48 (1) and 50—Dividends—Application for refund of tax deducted—Period of limitation—"Recovered," meaning of.*

A claim by the shareholder of a company for refund of tax under Sec. 48 (1) of the Income-tax Act in respect of dividends received by him, must be made within one year from the last date of the year in which the dividends were paid by the Company, and not the year in which the company paid to Government the tax on its profits.

Income-tax is "recovered" within the meaning of Sec. 50 of the Act when the dividend is paid.

Reference [Civil Reference No. 20 of 1924] made by the Commissioner of Income-tax, Bombay, as per letter No. A-58, dated 22nd October, 1924, under section 66 (2) of the Income-tax Act (XI of 1922) for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, 1922 ((XI of 1922, India) (hereinafter referred to as the Act) and at the instance of Mr. Amratlal K. Gandhi of Mandvi Street, Seth's Pole, Ahmedabad City, (hereinafter called the petitioner), I have the honour to submit for your Lordship's opinion, a question of the interpretation of section 50 of the above Act.

2. The reference arises on account of the claim made during the financial year 1924-25 for refund of income-tax on dividends received by the petitioner during the financial year 1922-23 from the Fazulbhoy Mills, Ltd.

3. On 1st June, 1924, the petitioner submitted to the Income-tax Officer, Ahmedabad, two dividend certificates from the Fazulbhoy Mills, Ltd., dated the 7th July, 1922, and 7th December, 1922, for Rs. 520 and Rs. 400 respectively, together with his returns of income for the years 1923-24 and 1924-25 and claimed refund of income-tax on the amount of these dividends under section 48 (1) of the Act.

4. The Income-tax Officer, Ahmedabad, disallowed the claim, saying that it was time-barred under section 50 of the Act, because the tax on account of these dividends was recovered by the company from the amounts of these dividends on the dates it distributed them, viz., 7-7-1922 and 7-12-1922. He held that as required by section 50, the petitioner should have lodged his claim within twelve months from the last day of the year 1922-23 in which the dividends were paid and tax recovered. The last day of the year 1922-23 was 31st March, 1923, and so the last day for presenting a claim for refund was 31st March, 1924. As the claim was put in on 1st June, 1924, it was time-barred according to the Income-tax Officer.

5. The petitioner thereupon appealed to the Assistant Commissioner of Income-tax, Northern Division, who agreeing with the above views of the Income-tax Officer, Ahmedabad dismissed the appeal. He then asked for this reference under section 66 (2) of the Act.

6. The petitioner's contention has been that tax on dividends was to be taken as recovered when tax on the profits of the company out of which these dividends were distributed was paid to the Income-tax Officer. The profits earned by

the Fazulbhoy Mills, Co., Ltd., in 1922-23 must have been, in the ordinary course assessed to tax during the year 1923-24 and the tax paid during that year. As the last day of that year (1923-24) was 31st March, 1924, the claim to refund was according to the petitioner, allowable till 31st March, 1925.

7. The question for your Lordships to decide is (1) what is the exact meaning of the words "the year in which the tax was recovered" in section 50 of the Act? Do they refer to the year in which the company concerned declares a dividend or the year in which it pays to Government the tax on the profits out of which the dividend is paid out? and (2) whether the claim made during the financial year 1924-25 for refund of income-tax on dividends declared and received in the year 1922-23 is time-barred under the above section 50 of the Act.

8. Section 50 of the Act runs as follows:—

"No claim to any refund of income-tax under this chapter shall be allowed unless it is made within one year from the last day of the year in which the tax was recovered."

The point to be considered is whether the date of recovery of tax in the case of a share-holder is the date when the company actually pays the tax or the date on which it declares a dividend.

9. I am respectfully of opinion that as far as dividends paid out by a company are concerned, the tax thereon must be taken as recovered on the date when they are declared. The company distributes net amounts of dividends after deducting tax and not gross amounts. It does not first declare and pay the amount of dividends without recovering the tax due thereon and thereafter, when tax is to be paid by it to Government, ask the share-holders to hand over to it the tax due on their dividends. Section 16 (2) of the Act requires that in calculating the income from dividends of an assessee, the amount actually received from a company "shall be increased by the amount of income-tax payable by the company in respect of the dividend received." This is because the shareholder is supposed to receive his dividend after deduction of the tax thereon by the company. Again, section 48 (1) of the Act says that "If a shareholder in a company who has received any dividend therefrom satisfies the Income-tax Officer that the rate of income-tax applicable to the profits or gains of the company *at the time of the declaration of such dividend* is greater than the rate applicable to his *total income of the year in which such dividend was declared*, he shall, on production of the certificate received by him under the provisions of section 20 be entitled to a refund on the amount of such dividend (including the amount of tax thereon) calculated at the *difference between those rates*." The words in italics above clearly indicate that the date of recovery of tax on dividends is the date when the company declares them, because for the purposes of refund, we are to take into account the rate in force on the date of declaration of the dividends and not the rate at which the profits are actually taxed. The company is supposed to recover the tax from the shareholders while declaring the dividends at the rate in force at that time and so refund is ordered to be granted under this section 48 (1) taking it that tax has been recovered at the rate in force at the time of declaration of the dividend. If the intention of the legislature was to take the date of payment of tax by a company as the date on which tax was recovered from its share-holders, there was no reason to lay down that the rate of tax in force on the date of declaration of the dividend should be taken into account in granting a refund. As the rates of tax are being annually prescribed in the Finance Act, they may vary from year to year and the rate of tax in the year in which a dividend is declared may be quite different from the rate in force in the year in which the company pays tax on the profits out of which this dividend was paid.

10. A very important point for your Lordships' consideration in this connection is the fact that under section 48 (1) of the Act, a shareholder can have a refund on account of a dividend received by him even before the company actually pays tax in respect of the profits out of which the dividend has been distributed. In this very case, on 1st April, 1923, the petitioner could have asked the Income-tax Officer to grant him a refund under section 48 (1) on account of the two dividends received by him in July and December, 1922 and the Income-tax Officer could have done so in that month. A company is allowed time under section 22 (1) of the Act to put in its profit and loss statement and balance sheet for the previous year till 15th June of a year and in the ordinary course is assessed some months thereafter. Hence, in the above case, a refund could have been granted in April, 1923, the company itself actually paying tax on its 1922-23 profits in August or September 1923. Now, what is the meaning of the word "refund"? It means giving back what has been paid already. If no tax was paid by the company, how can any refunds be granted to a shareholder if it is to be taken that he pays tax only when the company pays it. The law allows a refund clearly because it takes it that the company does recover tax at the time of the declaration of the dividend and it is that recovery which is the subject of a refund. I hope I have made my meaning quite clear to your Lordships. There can be no refund of tax which has not been recovered already as Government can refund only what has been already paid to it in excess. If we are to regard the shareholders as paying tax only when the company pays tax to Government on the profits from which the shareholders get their dividends, no refund can be allowed until the company pays tax. However, under section 48 (1), a shareholder claims and actually gets a refund even before the company pays the tax and that is because, as far as he is concerned, recovery of tax is taken to have been effected by the company on behalf of Government on the date his dividend is declared. The company after deducting tax in this way from the shareholders in due time settles its income-tax account with Government. The shareholders are also allowed to settle their income-tax account with Government directly under section 48 (1) taking due credit for the recovery effected by the company.

11. Another important point for your Lordships' consideration is the fact that the dividends are not always paid out of current profits. It is not wholly correct to assume that the dividend paid in the year A is paid out of the profits of the year A or that a dividend paid in the year A is paid out of the profits on which the company is taxed in the following year B.

Cases in which dividends are paid from reserves accumulated several years ago are within the knowledge of everybody and in such cases, according to the interpretation put in by the petitioner, the claim to refund will be always time-barred even if the shareholder applies for a refund immediately after the declaration of the dividend as the company paid tax on the reserves out of which the dividend is paid years ago. Section 48 (1) allows refunds on account of dividends received by a shareholder without any reservation as regards the source from which they might have been derived and does not exclude dividends paid wholly or partly from reserves. An interpretation on the lines suggested by the petitioner will result in excluding wholly such cases from the benefit of refunds.

12. The words "the year in which the tax was recovered" in section 50 might tempt us to rush into the conclusion that after the words "was recovered" the words "by Government" are to be taken as understood and that these words "by Government" are omitted simply because it goes without saying that the recovery is, of course, meant to be by Government. The whole Chapter VII to which this section 50 applies, will however, if gone through, make it clear to your Lordships that the recovery of tax referred to in this section is not confined to direct

recovery by Government, but extends also to recovery at source by various persons on whom the duty of deducting tax has been imposed under the Act. Take the cases referred to in section 48 (3). Tax on interest on debentures issued by a company is to be deducted under section 18 by the company at the time of payment of interest. Recovery is thus effected in these cases also by companies. In the case of interest on Government securities, tax is recovered by the persons empowered to pay the interest. Tax can be said to have been recovered from a person the moment it is withheld from any payment due to him. If Rs. 800 are due to me on account of interest on the debentures of a company, the moment the company pays me Rs. 725 deducting Rs. 75 on account of income-tax at 18 pies in the rupee, I will say that Rs. 75 have been recovered from me as tax. I myself will be short of this amount from that very date, no matter whether the company retains the amount with it or the Government and from that very moment will I desire to have it back wholly or partly, were I not really liable to pay so much as tax. In exactly the same way, were Rs. 800 due to me on account of dividends from a company, the moment it offers to give me Rs. 725 only, will I think of having been entitled to get back my Rs. 75 whoever might have got them, were I really not liable to any tax. I would not care how long the company might take to pay the amount to Government. If I were liable to tax at 12 pies only, I would think that Rs. 25 were recovered in excess from me and would wish to have the amount back from the day it was withheld from me. If I received the amount of Rs. 725 on 1st June, 1923 and if the company paid tax on 1st September, 1924, would I be debarred till 1st September, 1924 from saying that Rs. 75 were recovered from me on account of income-tax? Surely from the moment Rs. 75 were withheld from me would I be entitled to say that on account of income-tax Rs. 75 were recovered from the amount of dividend payable to me and would really think it sheer injustice if I were not to get back what was recovered in excess till after 1st September, 1924. I cannot think that the legislature ever meant to get tax actually recovered on behalf of Government on a certain date and then, for refund purposes, turn round and say that it was to be taken as really recovered months thereafter when the company paid its tax. Simply because one shareholder is not active enough to apply for his refund for months and months together, should we penalise all the other shareholders and keep them back from their refunds for over a year by interpreting section 50 as meaning that tax is to be taken as recovered from a shareholder not when it has been really recovered by the company on behalf of Government but when the company settles its account with the Income-tax Office and pays its tax on its total profits? I am not, My Lords, in any way inclined to be hard on a shareholder who sleeps over his right to apply for a refund for over a year, but, I cannot but submit that the logical conclusions of accepting the petitioner's interpretation of section 50 will be to take the shareholders as having paid tax only on payment of it by companies concerned and to keep them back from refund for over a year. The longer the company takes to get itself assessed and to pay its tax, the greater will be the delay in the shareholders' getting back what was really recovered from them long long ago. The interpretation of the section by the Officers of my Department allows refunds taking into account the very date on which the shareholders actually did suffer the burden of this taxation and it seems both just and equitable. The obligation to remove a burden to which one is not liable to be subjected arises from the date the burden falls on him and the practice of this Department has hitherto been to grant relief taking into account this very date. If the legislature had specifically added some such words as "by Government" after the words "was recovered" in section 50, I would have perhaps been inclined to support the petitioner's interpretation though it would have put many a shareholder to great inconvenience. Without any such specific provision, I emphatically endorse the views held by my officers and give it as my opinion that the date of recovery of tax for the purposes

of section 50 is the date on which the dividend is declared by a company. It declares the dividend deducting therefrom the income-tax due and the shareholders suffer the burden of taxation from that very date.

13. A copy of your Lordships' opinion in the matter may kindly be certified to me at an early date for further action in conformity with section 66 (5) of the Act.

The Advocate-General, instructed by the Government Solicitor, for the Crown.

JUDGMENT.

The Court is of opinion that the income-tax is "recovered" when the dividend is paid.

[119] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Broadway and Mr. Justice Jai Lal.

[15th April, 1925.]

Colonel Malik Sir Umar Hayat Khan and another ...

Assessees.

v.

Commissioner of Income-tax, Punjab ...

Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (1) and 4 (3) (viii)—Water from assessee's canals irrigating stranger's lands—Payment to assessee of share of produce therefor—If agricultural income.

The assessee, owners of private canals drawing water directly from the Jhelum, utilised the water, firstly to irrigate their lands and secondly, so far as it may be available, to irrigate the lands of others and paid the Government a royalty or "water due," under the Punjab Minor Canals Act, for every acre irrigated. The owners of the lands irrigated by the surplus water paid the assessee a fourth share of the produce as payment for the water used by them. On an assessment to income-tax of the income so received by the assessee,

Held, that the income in question is simply the price paid for water supplied and not income derived from land and consequently is not agricultural income within the meaning of Sec. 2 (1) of the Act and exempt from assessment.

Case [Civil Reference Case No. 24 of 1924] referred by the Commissioner of Income-tax, Punjab and North-West Frontier Province, with his letter No. 505-J-M. dated the 12th November, 1924, for the orders of the High Court.

CASE.

This reference which is made under section 66 (1) of the Income-tax Act (XI of 1922), deals with a point which has arisen in two cases, viz., those of Colonel Sir Malik Umar Hyat Khan, K. C. S. I., C. B. E., M. V. O., and Captain Malik Mumtaz Muhammad Khan, both residents of Shahpur District. Both own private canals which draw water direct from the Jhelum. This water is used, firstly, to irrigate their own land, and secondly, so far as it may be available, to irrigate the lands of others. Sir Umar Hayat Khan owns two canals, one (Piranwala) which irrigates 2,400 acres most of which belongs to others, and another (Sahibkhanwala), which irrigates 12,000 acres most of which belongs to himself. Captain Malik Mumtaz Muhammad Khan owns only one canal (Jehankhanwala) which irrigates 5,500 acres mainly owned by himself.

2. These canals appear to have been constructed some time after the Mutiny; and, ever since Sir James Wilson's settlement of Shahpur in the early nineties, Government, as owner of the water in the Jhelum, has charged the owners

of the three canals not less than four annas per acre irrigated. When the settlement was revised in 1916 the rate was raised to twelve annas, and the charge is now levied as a "water due" under section 8 read with section 3 (xiii) of the Punjab Minor Canals Act (III of 1905). The owners themselves, in payment for the water they sell to others, take one-fourth share of the produce of the land irrigated. The only exception to this rule is in the case of fodder, payment for which is sometimes taken in cash. This, however, represents only a very small portion of the total payments.

3. The question for the decision of the High Court is whether this income is exempt from income-tax under section 4 (3) (viii) read with section 2 (1) (a) of the Income-tax Act; or, in other words, whether it is "agricultural income" within the meaning of the definition given in section 2 (1) (a), which runs as follows:—

"Agricultural income" means—any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such."

4. According to this definition, for the income in question to be exempt, it must be shown:—

(a) that it is derived from land;

(b) that the land from which it is derived is used for agricultural purposes; and

(c) that the land is either assessed to land revenue or subject to a local rate assessed and collected by officers of Government as such.

For the assessee it is contended that condition (a) is doubly satisfied, as the income is derived not only from the land which grows the produce paid for the water, but also from the land which forms the canal.

In regard to (b), it is claimed that in either case the land is used for an agricultural purpose; and in regard to (c), that the land from which the produce is obtained is assessed to land revenue and that the canal land itself is subject to a local rate in the shape of the "water due" referred to above.

5. From this it will be seen that the owners of the canal ground their claim to exemption upon two contentions, viz., that the income they receive in payment for their surplus water is derived—

(1) from the land out of which the canals have been constructed, and,

(2) from the land irrigated by the canals.

In both cases it is claimed that the land is used for an agricultural purpose, and in the first case it is said that the land is subject to a local rate in the form of a 'water due,' while in the second case the land is admittedly assessed to land revenue.

6. I take the first contention first. It may be conceded that the construction, maintenance, and use of an irrigation canal are agricultural purposes, but it seems to me extremely doubtful whether the income we are considering can be said to be derived from the land out of which the canals are constructed. It would seem to me rather to be derived from the water which passes over it.

Nor, in my opinion, is condition (c) of paragraph 4 above satisfied. The land has admittedly never been assessed to land revenue, probably because the assessee claims an indefeasible right of easement to carry canal water over it, vide, statement of the counsel, dated 2nd August, 1924 (copy attached). And as the land revenue thereon has never been "released, compounded for, redeemed or

assigned" [vide definition of "land" in section 3 (1) of the Punjab District Boards Act of 1883], the land is not subject to a local rate. Still less is it actually assessed to such a rate, and it may well be argued that section 2 (1) (a) of the Income-tax Act only excludes land on which a local rate is actually assessed and collected. The only rate payable by the assesseees is the "water due" referred to above, which is not a local rate within the meaning of the District Boards Act but, as has already been stated, a due payable under the Minor Canals Act. It is in effect a royalty paid to Government not as owner of the land over which the water passes, but as owner of the water of the Jhelum from which the canals are supplied. Accordingly, so far as the first contention is concerned, it seems to me that the assesseees' claim fails.

7. I come now to their second contention, namely, that the income in question is derived from the land irrigated by the canals. There is no doubt that the land from which the produce is derived is used for agricultural purposes and is also assessed to land revenue. Two out of the three conditions specified in the definition are, therefore, satisfied. There remains the question whether the income which is received in the form of produce can be said to be derived from the land which grows the produce. If the water supplied by the assesseees was paid for in cash, the income derived therefrom would presumably be taxable, as it would be on the same footing as any other income derived by those who sell commodities such as implements, seed or manure, to agriculturists. In this case, however, it is contended that, since the owners of the canal receive for their water a share of the produce instead of cash, they are virtually partners in the cultivation of the land and as such derive their income from it. There would be more force in this contention, if it could be shown either that the payments made for the water constituted rent for the land rather than rent for the water, or that the owners of the water were bound under any circumstances to supply it to those who take it at present. Formal enquiry made by the Income-tax Officer, Shahpur, shows, however, that the payments are in no sense rent for the land, and, that the assesseees are not bound to supply water to anyone regardless of circumstances. In this connection I attach a copy of the written reply submitted by Counsel for the two assesseees to three questions put to him by the Income-tax Officer. The following may also be quoted from Sir James Wilson's Shahpur Settlement Report for 1887-94 (p. 66):

The owners of private canals were required to execute an agreement to the following effect:—

We agree for the term of settlement to the following conditions:—

(1) We agree to pay a fluctuating royalty at the rate of two annas per bigha (equal to four annas per acre) on all land, whether belonging to ourselves or others, irrigated from our canals.

(2) So long as the present assessment continues in force, we agree unless with the special sanction of the Government, not to charge for water other persons irrigating their lands from our canals more than the present rates which are for flow irrigation, one-fourth of every kind of produce, including straw and grass, besides two seers per maund of uncleaned cotton and two tolas per maund of grain as *mahassili*, etc., and for jhalars on the canals belonging to Malik Hakim Khan and Malik Khuda Bakhsh Rs. 20 per jhallar,

Provided that in special cases, for instance, if the water be applied to uncultivated land or by the fault of the irrigator the water be wasted or the produce be less than it should be, we shall be considered entitled to realise whatever in similar circumstances Government realises on State canals.

(3) We agree to continue, as far as possible, to give water to land at present irrigated from our canals but our own land shall have a preferential right to

water; and we shall be entitled with the sanction of the Deputy Commissioner to stop this supply of water to any land in circumstances under which Government would have stopped the supply of water from a State canal.

The above agreement was signed by the assesseees. Elsewhere in his report (page 29) Sir James Wilson remarks that the area irrigated fluctuates greatly from year to year, as the owners of the private canals only give others the surplus water not required by themselves.

In this connection, it may be mentioned, that the question whether these payments are liable to assessment was referred by the Punjab Government to the Government of India in 1898 (*vide* their Letter No. 21 S. dated 19th May, 1898). It was held by the Government of India that the levy of the royalty, as the 'water due' was then called, could not "operate to exempt the owners of the canals from the payment of income-tax on the net profits they derived from the sale of the water." This view seems to me as correct now as it was then.

8. A further argument is urged by Counsel, namely, that though the income is received on account of water, it is to the land that the owners of the canal look for the satisfaction of their claim. This argument is based upon P. L. R. 180 (Case No. 184 of 1898 *Sher Shah v. Natha Singh and others*) in which it was held that a suit to establish a right to the use of canal water for irrigating land was a suit relating to land. In that case plaintiff asked for "a declaration in respect of a certain proportion of the annual produce coming to him." In regard to this claim the judgment states as follows:—

"He (the plaintiff) certainly claims that share as rent on account of water privilege, but he looks to the land itself for his satisfaction, hence his suit can be held to be one relating to land." In my opinion the judgment is irrelevant to the present issue, as it merely states that the suit in question is one "relating to land"; it does not say that the "rent on account of water privilege" is "derived from land" which are the words used in section 2 (i) (a) of the Income-tax Act. The plain meaning of these words is that to be exempt from tax the income must be *directly* derived from land. If income that is *indirectly* derived from land is exempt, much income that is now assessed to income-tax without question would escape, such as the income of a money-lender derived from payments in grain or the income of a merchant dealing in sugar or cotton. In this case the assesseees have no rights in the land irrigated with their water, nor any rights connected with it; nor have they any proprietary title to the produce. Their share in the latter therefore cannot in my opinion be said to be derived from the land. As, however, the question is not entirely free from doubt, I refer it to the High Court under section 66 (1) for decision.

Reply submitted by counsel.

Q. 1. Has the revenue on the canal lands been released, redeemed, compounded or assigned?

A. No. Revenue is assessed on the lands irrigated by the canals in question and is paid by the proprietors direct to the Government. In addition to the land revenue paid by the proprietors to the Government the proprietors pay—

(a) To the Maliks the *Haq Chaharmi* due, which is a payment in kind, of one-fourth of the produce of the area irrigated;

(b) *Khushhasiati* dues to the Government on the area irrigated.

On the *Haq Chaharmi* dues realised by the Maliks they have to pay to the Government *Haq Shahi* or royalty. This will appear from a copy of the *Fard Bachch* of Jahanabad attached herewith. Similar entries relating to other villages can also be produced.

Local rates and cesses are charged upon such lands. The land underneath the channels vests in the original proprietors but the Maliks have an absolute and indefeasible right of easement over it to carry canal water.

Q. II. What is the precise nature of the agreement, if any, between the landlords and the canal owners ?

A. The agreement between the land owners and the canal owners are embodied in the *Wajib-ul-arz* of the various villages, copies of some of which are enclosed herewith. Ever since the canals were dug the landholders have been taking water on payment of one-fourth *Batai*.

Q. III. Whether the canal owners can refuse giving water to the *Zatmindars* ?

A. The area commanded by the private canals has been demarcated in the Settlement of Mr. Wilson in 1891-92. In this area the proprietors are entitled to take the required quantity of water from these canals on payment of the prescribed one-fourth *Batai* to the canal owners. They cannot irrigate their lands from Government or other canals. There is a regular file in the Deputy Commissioner's Office re-demarcating the area commanded by private and Government canals. Application for copies has been made and as soon as the copies are received they will be produced.

The Government Advocate for the Crown.

Bakshi Tek Chand for the assesses.

JUDGMENT.

This is a reference made under section 66 (1) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and N. W. F. Province. It appears that Colonel Malik Sir Umar Hayat Khan and Captain Malik Mumtaz Muhammad Khan, two large landholders in the District of Shahpur own private canals which draw water direct from the Jhelum. This water is used by them (1) to irrigate their own land, and, (2) to irrigate the land of others, so far as the volume of water may allow.

Government charges the owners of the said canals royalty or 'water due' which was at one time annas four but now is annas twelve per acre irrigated.

The owners of the said canals receive from the owners of the land irrigated by the surplus water a fourth share of the produce. The question referred to this Court by the Income-tax Commissioner is whether the income derived by the owners of the canals from the owners of the land irrigated by the surplus water is liable to income-tax. Admittedly if this income can be held to be 'agricultural income' as defined in section 2 (1) (a) of the Income-tax Act the said income would be exempt under S. 4 (3) (viii) of the Income-tax Act. Mr. Tek Chand on behalf of the owners of the canals contended that the income in question was 'agricultural income' within the meaning of the definition given in section 2 (1) (a) as also in the definition to be found in section 2 (1) (b) (i).

The relevant sections are as follows :—

"Agricultural income" means :—

(a) Any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by Officers of Government as such:

(b) Any income derived from such land by (i) agriculture."

Now it seems to us to be quite clear that the income before it can be regarded as "agricultural income" must be derived from land again the land from which

it is derived must be used for agricultural purposes and finally that land must be assessed to land revenue or be subject to a local rate assessed and collected by officers of Government as such. The Income-tax Commissioner has given it as his opinion that the income must be derived directly from the land before it can be regarded as exempt. To this Mr. Tek Chand took exception and urged that inasmuch as the lands irrigated by the surplus water were used for agricultural purposes and were assessed to land revenue, the income derived from the payment of the share of produce must be regarded as an income derived from the land. He also contended that inasmuch as the owners of the canals had acquired an easement over the land through which the canals were dug, the land under the water must be regarded as appurtenant to the lands irrigated and inasmuch as "water due" is levied under the Punjab Minor Canals Act, the land is subject to a local rate and the income in question is exempt. He urged that the income could not be derived from the sale of water inasmuch as it might happen that in spite of water being supplied there may be no crops produced on the land irrigated and therefore there would be no price paid for the water. Mr. Dalip Singh for the Crown on the other hand contended that the income in question was derived directly from the sale of water and the mere fact that there was a remote possibility that there may be no payment for the water supplied did not affect the question or render the income one derived from land. In the course of arguments our attention was drawn to *Commissioner of Income-tax v. Zamindar of Singampatti* (1), *Birendra Kishor Manikya v. Secretary of State for India* (2) and *Emperor v. Probat Chandra Barua* (3).

We have considered these authorities but as the question now before us was not before the Madras and Calcutta Courts we are unable to see that they afford any material assistance. So far as the claim to exemption is based on the land under the canal bed, we are unable to agree with Mr. Tek Chand's contention. We cannot see that that land is in any way subservient or appurtenant to the land irrigated by the surplus water. It is true that the land irrigated by the surplus water is used for agricultural purposes and we may assume that it is assessed to land revenue; the income in question however does not appear to us to be one derived from land at all. The direct source of the income is the supply of the water and the income is in our judgment simply the price paid for the water supplied. The mere fact that it is paid in kind instead of in cash does not in our opinion affect the question. The income is directly derived from the sale of water and not from the land to which the water is supplied so far as the owners of the water are concerned.

In our opinion therefore the income in question not being derived from land cannot be regarded as agricultural income and is therefore not exempt from income-tax.

[120] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Jwala Prasad.

[24th and 27th April, 1925.]

Shiva Prasad Singh

v.

Assessee*

Commissioner of Income-tax, Bihar and Orissa ...

Referring Officer.

Income-tax Act (XI of 1922), Sec. 12—Income from royalties on coal—Bihar and Orissa Mining Settlement Act, 1920, Sec. 23 and Jharia Water Supply Act, 1914, Sec. 45—Cesses thereunder, if deductible.

* (1925) I. L. R. 4 Pat. 752; A. I. R. (1926) Pat. 109; 91 Ind. Cas. 476.
1. I. T. C. 181; I. L. R. 45 Mad. 518. 2. I. T. C. 67; I. L. R. 48 Cal. 766.
3. I. T. C. 284; I. L. R. 51 Cal. 504.

An assessee assessed under Sec. 12 of the Income-tax Act ("other sources") on income consisting of royalties on coal is not entitled to deduct, in the computation of his taxable income, the cesses paid by him under Sec. 23 of the Bihar and Orissa Mining Settlement Act, 1914. The payment of the cesses, though a necessary expense arising in connection with the ownership of the royalty, is in no sense an expenditure incurred for any purpose incidental to the making of the income.

Raja Jyoti Prasad Singh Deo, In re, 1 I. T. C. 103, applied.

K. M. Selected Coal Company of Manbhum, In re, 1 I. T. C. 281, distinguished.

Manindra Chandra Nandi v. Secretary of State for India, (1907) I. L. R. 34 Cal. 257 referred to.

Case [Miscellaneous Judicial Case No. 136 of 1924] referred under section 66 (1) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Behar and Orissa, for the opinion of the High Court.

CASE.

The question for the decision of the High Court is, whether an assessee who is assessed under section 12 of the Income-tax Act, 1922, on income from "other sources" (consisting of royalties on coal), is entitled to have deducted, before the taxable income is determined, the cesses paid by him to the Jharia Water Board and the Mines Board of Health.

2. The facts are undisputed: the assessee is a zamindar who derives considerable income from royalties on coal; under the Jharia Water-Supply Act and Bihar and Orissa Mining Settlement Act, cesses are imposed on owners of mines and receivers of royalty. Under the Water-Supply Act, the cess is assessed on the actual amount of royalty received during the preceding calendar year, and, under the Mining Settlement Act, the demand is a percentage (at present 20 per cent.) of the average of the preceding three years' road-cess demand.

3. In my opinion such cesses are not deductible expenses under the law. Under section 12 (2) of the Act, the only permissible allowance is any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the income. The Patna High Court held in Case No. 102 of 1920 [*Raja Jyoti Prasad Singh Deo* (1)] that road-cess could not be deducted before determining the assessable income from royalty; (this was a decision under the Income-tax Act of 1918, but for the present purpose the relevant sections of the Income-tax Act of 1922 are practically identical). It is admitted on behalf of the assessee that this decision would apply to the present case if he were assessed to these local cesses on his net income and not on his gross income. His position is that if he receives Rs. 5,000 royalty and in turn pays Rs. 4,000 in royalty to a superior landlord he is assessed to water-cess on Rs. 5,000 and not on the net income of Rs. 1,000. This argument would not in any case apply to the cess payable to the Mines Board of Health which is based on the road cess which is in turn calculated on the net profits. But, in my opinion, the argument has no validity even as regards the water-cess. In the case already referred to, the Court held that the payment of cess (i. e., road-cess) is a necessary expense arising in connection with the ownership of royalties but it is in no sense an expenditure incurred for any purpose incidental to the making of the income. This remark applies equally to the cesses now under consideration. Moreover, income-tax is assessed on the net income; in the example given above income-tax would be assessed on Rs. 1,000, less the expenses incurred in collecting the Rs. 5,000.

In Miscellaneous Judicial Case No. 77 of 1923 [*K. M. Selected Coal Company of Manbhum* (2)], the High Court of Patna held that the cesses in question

(1) 1 I. T. C. 103; (1921) 6 Pat. L. J. 62.

(2) 1 I. T. C. 281; (1924) I. L. R. 3 Pat. 295.

could be legitimately deducted from the profits of a colliery (an assessment of a business under section 10) before determining the assessable income. But that case was definitely and deliberately distinguished from the previous one mainly on the ground that the local cesses were not rates levied after the profits had been ascertained. In fact the colliery business pays on its raisings and despatches, irrespective of whether it made any profits at all.

Nares Chandra Sinha and B. B. Ghosh, for the assessee.

Sultan Ahmed, Government Advocate, for the Crown.

JUDGMENT.

DAWSON MILLER C. J.—This matter comes before us on a case stated by the Commissioner of Income-tax under section 66 (1) of the Income-tax Act, 1922. The assessee in the case is the Raja of Jharia who derives a considerable income as the owner of royalties which he receives under mining leases, of which he is the lessor, in the Jharia coalfields. The question for our opinion is whether in arriving at the taxable income derived from that source the assessee is entitled to deduct certain cesses or rates imposed upon the owner of such royalties under two local Acts, known as the Jharia Water-Supply Act, 1914, and the Bihar and Orissa Mining Settlement Act, 1920. Under the former Act a cess is leviable within the area prescribed both upon the owners of coal mines and upon the holders of royalties from those mines. In the case of mine-owners who are themselves working the mines the cess is a cess on the annual despatches of coal and coke from the mine and would be payable apart altogether from whether any profit is derived from the actual working of the mine. In the case of a person receiving royalties from mines the cess is paid upon the royalties received at a certain rate which is determined by the Board with the approval of the Local Government subject to a maximum of 5 per cent. on the assessed amount of royalty. Under the latter Act of 1920 a somewhat similar rate is imposed under section 23 both upon the owners of mines and upon persons who receive any royalty, rent or fine from such mines. In this case the assessment is based, in the case of owners of mines, on the actual output of their mines, and here again the assessment in the case of owners is apart from any profit that may or may not be derived from the working of the mine. In the case of receivers of any royalty, rent or fine their assessment is calculated on a percentage of road-cess payable by such persons. At present the amount is one-fifth, or 20 per cent. of the average yearly road-cess payable by such persons in respect of their royalties during the last three years.

The only question which arises for decision in the case is whether under section 12 of the Indian Income-tax Act these cesses or taxes can be deducted in arriving at the taxable income for the purpose of income-tax. It was decided in the case of *Jyoti Prasad Singh Deo* (i) that income derived from royalties came within section 12 of the Income-tax Act which relates to income derived from "other sources" and not under section 10 which applies to income under the head of "business." The deductions which may be made from the different classes of income mentioned in the Act are stated in detail in the different sections dealing with the different heads of income, and under section 12 which applies to the present case it is provided that the tax shall be payable by an assessee under the head "other sources" in respect of income, profits and gains of every kind and from every source to which this Act applies if not included under any of the preceding heads. By cl. (2) of the section—and this is the important part of the enactment—such income, profits and gains shall be computed after making allowance for any expenditure

(1) 1 I. T. C. 103.

(not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee. Now the only allowances or deductions which are permissible in the case of income derived from "other sources" referred to in section 12 are those already mentioned in clause (2) of that section, namely, any expenditure incurred solely for the purpose of making or earning any income, profit or gain. It is contended in this case that the deductions leviable under the two Bihar and Orissa Acts to which I have referred are expenditure incurred for the purpose of making or earning such income. The case of the *K. M. Selected Coal Company of Manbhum* (1), was relied on in support of this contention. But the reasons for that decision do not apply in this case. There the assessee was the lessee of mines and the income taxed was profits derived from business. The local taxes as already stated in such a case are levied on the output or despatches apart from the profits of the business and whether a profit is made or not, and must be taken into account in ascertaining whether there is a profit which is subject to income-tax.

The present case appears to me to be governed by the principle adopted in the earlier case of *Raja Jyoti Prasad Singh Deo* (2). In that case this Court decided that in determining the taxable income derived from royalties, cesses payable under the Cess Acts, that is to say, road-cess and public works cess, cannot be deducted in arriving at the taxable income under the head of royalties and the only question is whether there is any distinction between the case of a road-cess and the case of the cesses imposed under these two Acts. In that case it was argued as has been argued here, that the taxes should be deducted in order to ascertain what was the actual income. It was pointed out, however, that the cess was leviable upon exactly the same income as the income-tax itself and, following the case of *Manindra Chandra Nandi v. The Secretary of State for India* (3), which held that income-tax could not be deducted in order to ascertain the amount upon which the road-cess was leviable, this Court held that, similarly, you could not deduct the road-cess in order to ascertain the amount upon which the income-tax is leviable because both taxes were imposed upon the same income; and it was there pointed out that the liability to pay the road-cess resulted from the income having been made, and the payment of the cess could hardly be said to form a necessary part in the earning of the income which must come into existence before the liability to cess arises, and, although the payment of cess was a necessary expense arising in connection with the ownership of royalty, it was nevertheless in no sense an expenditure incurred for any purpose incidental to the making of the income. No argument has been adduced before us in this case which distinguishes the case of the cesses imposed under these Acts from the case of road-cess. It seems to me that in both cases the cess is imposed upon exactly the same income and the mere fact that the income-tax is also imposed on that income is in itself no reason why the cesses should be deducted in order to ascertain the taxable amount of income any more than it is why the income-tax should be deducted in order to ascertain the amount of cess. I can see no distinction in principle between the present case and the case of *Raja Jyoti Prasad Singh Deo* (2) and in my opinion the Income-tax Commissioner arrived at a proper conclusion in the case which he stated for our opinion.

JWALA PRASAD J.—The royalties derived by the owners of lands containing minerals give rise to the following taxes:—

(1) 1 I. T. C. 281; (1924) 1 L. R. 3 Pat. 295.

(2) 1 I. T. C. 103; (1921) 6 Pat. L. J. 62.

(3) (1907) 1 L. R. 34 Cal. 257.

(1) Cess levied under the Cess Act (IX of 1880, B. C.) as amended by the Bihar and Orissa Act I of 1916. That cess is a cess on the annual net profits derived from the mines contained within the zamindari in the shape of royalty.

(2) Cess levied under the Jharia Water-Supply Act (Bihar and Orissa Act III of 1914) on royalties derived from mines, and

(3) A tax under the Bihar and Orissa Mining Settlements Act (Bihar and Orissa Act IV of 1920) assessed on the local cess payable by the zamindar who owns the lands in which the mine is situated.

It is thus clear that the sources of the three taxes are the same, namely, the amount of royalty received by the zamindar and each of them is to be assessed irrespective of what is paid under the remaining two Acts. Therefore the payments made with respect to any one of the aforesaid taxes cannot be taken into account in the assessment made for the tax payable under the other Acts. The result is that the taxes payable by the assessee in the present case under the Jharia Water-Supply Act as well as the Bihar and Orissa Mining Settlements Act cannot be deducted from the royalty received by him in assessing the tax payable under the Income-tax Act of 1922. I therefore agree with the order of my Lord the Chief Justice.

[121] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Sydney Robinson, Kt., Chief Justice, Mr. Justice Maung Gyi and Mr. Justice Cunliffe.

[27th April, 1925.].

A. R. A. R. S. M. Somasundaram Chettiar ...

Assessee.

v.

Commissioner of Income-tax, Burma ...

Referring Officer.

Income-tax Act (XI of 1922), Sec. 66—Reference to High Court—Jurisdiction confined to questions of law—Chetty Firms—Charging of interest between Head Office and Branch—Assessability.

On a reference under Sec. 66 of the Income-tax Act, the High Court can decide only questions of law properly so called and it is not open to the Court to consider, reverse or modify the findings of the Commissioner on questions of fact, before it considers and decides questions of law and sub-section (4) cannot confer any such jurisdiction over questions of fact.

Though it is a common practice that Chetty firms, while purporting to charge interest on loans to their branches and showing the interest in their accounts, never as a matter of fact, actually draw it, the entry being made only for calculating commission payable to the Branch agent, yet where interest is charged to and paid by the Branch, such interest is chargeable to income-tax.

Case [Civil Reference No. 2 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma, in compliance with order of Court, reported in 1 I. T. C. 392.

CASE.

In compliance with the order of the Hon'ble Judges in Civil Miscellaneous Application No. 60 of 1924—*A. R. A. R. S. M. Chockalingam Chettiar* by his agent, *Somasundaram Chettiar v. The Commissioner of Income-tax, Burma* (1), I have

the honour to forward herewith a statement of the facts connected with the assessment out of which the reference to the High Court arose and also a statement of the questions of law which, it is claimed, arise and my opinion on each of the said points.

Statement of the case and of the questions referred.

In this case, an application was made by A. R. A. R. S. M. Chockalingam Chettiyar requesting that a reference, under section 66 (2) of the Indian Income-tax Act, 1922, might be made to the High Court of Judicature at Rangoon in respect of twelve points which were said to be questions of law arising out of the order of the Assistant Commissioner of Income-tax. This application was rejected on the 17th July, 1924 on the ground that one fee only of one hundred rupees had been paid instead of one such fee in respect of each question of law. In the order of rejection, only the first point raised in the application was dealt with. The High Court of Judicature at Rangoon, to which the applicant then applied for a mandamus, recorded its opinion that one fee was sufficient to cover all the questions of law that might be raised in one application and returned the case to me with a request that I would deal with the other points raised and then refer the case or refuse to do so.

The facts of the case are as follows:—

A Hindu undivided family, consisting of A. R. A. R. S. M. Somasundaram Chettiyar of Devakottai and his sons, had businesses at Rangoon and Jaffna among other places. Up to the year 1920-21, the Hindu undivided family was assessed at Madras on their aggregate income from all sources and places of business. In 1921-22, A. R. A. R. S. M. Somasundaram Chettiyar represented to the Collector of Madras that he and his sons had become divided in respect of some of their family assets, including the Rangoon and Jaffna businesses, and asked that he might be assessed separately from the joint family in respect of the Rangoon and Jaffna businesses which he had taken over for his sole benefit. He produced the partition deed before the Collector of Madras in support of his claim. The local agent at Rangoon also stated that Somasundaram Chettiyar had actually taken over the Rangoon business for his sole benefit and from the Rangoon account which he showed it appeared that the partition deed had been given effect to by Somasundaram Chettiyar who had made payment of the amount stipulated in the deed on account of the Rangoon business. Somasundaram Chettiyar was thereupon assessed at Rangoon for 1921-22 on his income from the Rangoon business and on that portion of the profits of the Jaffna business which was received in British India; a separate assessment was made at Madras in respect of the income of the estate of the Hindu undivided family of which Somasundaram Chettiyar was a member.

3. For the assessment of 1922-23, the Rangoon agent submitted a return of Somasundaram Chettiyar's income of the previous year, i. e., 1921-22, filed a balance sheet and a profit and loss statement and also produced the accounts, as required by the notices issued to him under sections 22 (2) and 22 (4). The accounts were examined but, before the income could be finally determined and assessment made at Rangoon, Somasundaram Chettiyar died. It was now necessary to ascertain who were the successors to his business. The Income-tax Officer, Madras, reported at first that the sons of the deceased had succeeded to his business and that he would assess them at Madras on the joint family's total income including that derived from Rangoon and Jaffna. Subsequently, the sons of the deceased represented to the Income-tax Officer, Madras, through their Vakil, that, after their father's death, they had come to hold in partnership the businesses at Rangoon and Jaffna which had been their father's separate property. The Income-tax Officer, Madras, accepted this contention and stated that a separate assessment should continue to be made at Rangoon, as in the previous year, on the income from the Rangoon and Jaffna

businesses and that he was making a separate assessment at Madras on the income derived from the joint family property. Accordingly the assessment for 1922-23 was made at Rangoon under section 26 of the Income-tax Act in the name of the A. R. A. R. S. M. firm consisting of the sons of the deceased who had succeeded to his businesses, at Rangoon and Jaffna.

4. The accounts of the Rangoon business produced for the assessment for 1922-23 had been audited by Messrs. Cornelius, Logan & Co., a firm of Chartered Accountants at Madras, who had arrived at a net taxable income of Rs. 18,446. In drawing up the profit and loss statement, Messrs. Cornelius Logan & Co., had put in Rs. 1,66,902-10-0 as the valuation of the opening stock of rice in the old account and Rs. 67,195-13-6 as the valuation of the closing stock of rice, according to the new account. The accounts produced by the Rangoon agent showed that the valuation of the opening and closing stocks had not been made in accordance with the general principle that cost price or market value, whichever was less, should be adopted. For the purposes of the assessment, the valuation was therefore revised in accordance with this principle and also with reference to the actual stock worked out from the books as details were not furnished by the auditors. In arriving at the net profit of the Rangoon business, the auditors had ignored receipts amounting to Rs. 1,22,232-12-9 on account of the interest paid by the Jaffna branch in respect of the advances made by the Rangoon office. The Chartered Accountants remarked that the credit in the Rangoon accounts was only a book adjustment and that there had been no remittances from Jaffna into British India. The accounts relating to the Jaffna business were produced before the Special Income-tax Deputy Collector at Colombo. They were, however, not complete, and according to the Special Deputy Collector's scrutiny, the accounts produced before him showed a net loss of Rs. 93,356-2-2 after allowing for payment of interest of Rs. 1,22,232 as. 12 p. 9 that had been made to the Rangoon Office. This result was reported by the Special Deputy Collector with the reservation that all the assessee's transactions of the account year had not been fully disclosed in the accounts produced before him. Messrs. Cornelius, Logan & Co., however, took the above loss as having been accepted by the Special Deputy Collector of Colombo, and, by ignoring the payment of interest, viz., Rs. 1,22,232-12-9, to the Rangoon Office in the same way as they ignored the receipt of this sum in the Rangoon accounts, arrived at a profit of Rs. 28,867-10-7 on account of the Jaffna business. At the same time, they added a note to the effect that "no remittance has been made from Jaffna into British India." The Rangoon accounts that were examined at Rangoon, however, showed that Messrs. Cornelius, Logan & Co., had committed a grave blunder in saying that there was no remittance from Jaffna into British India. As a matter of fact, remittance made from the Jaffna branch to Rangoon, via Colombo amounted to Rs. 8,12,700 in the account year. The interest payment of Rs. 1,22,232-12-9 that was shown in the Jaffna branch as having been made to Rangoon and in the Rangoon accounts as having been received from Jaffna and credited in the Rangoon accounts was therefore added back to the taxable income. The alleged loss of the Jaffna branch, which had not been properly proved, was left out of account. The scrutiny of the Jaffna accounts made by the Special Deputy Collector of Colombo showed that the firm carried on business in *Thalam* Paddy at several places within British India and that the sales effected in British India had been included in Jaffna account. There was admittedly a profit from this paddy business which the Special Deputy Collector of Colombo estimated at not less than Rs. 16,799 (i. e., at one Rupee per bag). In computing the firm's total income liable to income-tax at Rangoon, the taxable income of Rs. 18,446 arrived at by Messrs. Cornelius, Logan & Co., was accordingly raised to Rs. 1,88,622, as shown below, by the addition of Rs. 1,70,176 :—

	Rs.
(1) Difference due to valuation of opening and closing stock	23,491
(2) Interest from Jaffna Branch	1,22,233
(3) Sale of paddy in British India	16,799
(4) Interest from customers and not included in the Auditor's Profit and Loss Statement	7,653
TOTAL	Rs. 1,70,176

The assessment order of the 31st March, 1924 was framed accordingly. In respect of this the applicant appealed to the Assistant Commissioner of Income-tax Rangoon, in a petition dated the 22nd April, 1924, subsequently putting in a further petition dated the 8th May, 1924. The order of the Assistant Commissioner of Income-tax, Rangoon, on these petitions was on the 20th May, 1924. The questions of law which are referred for decision by the High Court of Judicature at Rangoon, as arising out of this order of the Assistant Commissioner, are as contained in the application of the 13th June, 1924.

Statement of my opinion on each of the questions referred.

The first point raised is:—

"Whether the business of one member of the joint Hindu family can be separately assessed at Rangoon, when, before effecting assessment, the said member died leaving him surviving the other members of the undivided joint Hindu family who are separately assessed for their Madras business."

As stated in the narration of the facts of the case, the assessment made at Rangoon was in the name of the firm or partnership that succeeded to the deceased person's businesses at Rangoon and Jaffna while the assessment made at Madras continued to relate to the Hindu undivided family. There is nothing in the income-tax law to prevent income accruing, arising or received in British India from businesses in Rangoon and Jaffna from being taxed as the income of a firm or a partnership although the persons concerned in the firm or partnership are members of a Hindu undivided family which is taxed separately in respect of other property, if it is proved to the satisfaction of the assessing officer that the income of the firm is not part of the income of the Hindu undivided family. So far as income-tax revenue is concerned, it would have been advantageous to Government to have lumped the incomes of the Rangoon and Jaffna businesses with the income of the Hindu undivided family at Madras. While there are two assessments, an allowance of Rs. 75,000 untaxed must be made for super-tax in respect of the Hindu undivided family as well as an allowance of Rs. 50,000 in imposing super-tax on the income of the firm or partnership from the Rangoon or Jaffna businesses. If there were only one assessment, only Rs. 75,000 would be allowed free in imposing super-tax, and moreover, certain amounts would become liable to much higher rates of super-tax than has been paid in respect of them. In this case, the Income-tax Officer accepted it as a fact that the sons in partnership succeeded to the businesses at Rangoon and Jaffna separately from the joint family property and he made the assessment accordingly although the separation involved a loss of tax.

The second point raised is as follows:—

"In case the High Court be of opinion that there can be two separate assessments, whether or not the assessee is entitled to be assessed at Rangoon to super-tax as a Hindu undivided family or company within the meaning of section 55 of the Income-tax Act."

The answer to this follows from the answer on the first point. The treatment the Rangoon and Jaffna businesses as the property of a firm or partnership

separate from the Hindu undivided family is in accordance with requests made by or on behalf of the applicant as has been stated in the narration of the facts of the case.

The third point raised is:—

“Whether in determining the income or profits of a business, it is open to the income-tax authorities to lay down a rule that the market value or the cost price, whichever is higher, is to be taken into account and whether such a rule being opposed to common law (requiring the cost price of stock to be taken into account) is enforceable at law.”

It has already been explained that the valuation has been made in accordance with the principle that the cost price or the market value, whichever is less, should be adopted.

The fourth point is :—

“In the case of a business concern having the Head Office in British India and a branch office outside British India (Jaffna in Ceylon), whether or not the profits and losses in both places are to be taken into account in determining the income.”

The suggestion here is that there was a loss on the Jaffna business which should have been taken into account in determining the taxable income. It will have been seen from the narration of the facts that the Special Deputy Collector, Colombo, did not accept the loss as proved. It may, however, be noted that the answer on the fourth point raised is definitely in the negative. The profits or losses of the branch outside British India, as such, do not concern this department at all. The fact that the profits or losses of such a branch are taken into account in the balance sheet prepared in India signifies nothing [explanation to section 4 (2) of the Indian Income-tax Act, 1922]. Section 4 (2) of the Income-tax Act prescribes that “profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India.” Therefore a branch business outside British India only comes within the purview of the Indian Income-tax Act when two conditions are fulfilled; *firstly*, profits and gains must accrue or arise from it to a person resident in British India and, *secondly*, such profits and gains must be received in or brought into British India. Only to the extent to which the second of these conditions is fulfilled is there the liability to tax.

The fifth point is :—

“In view of the provisions of section 4 and the explanation thereto, whether or not the Income-tax Officer is entitled to regard as income a debit book entry of Rs. 1,22 223 representing interest proportionate to the amounts invested by the Head Office at Rangoon in the branch business in Ceylon (Foreign parts).”

The justification for including this figure in the applicant's taxable income lay in the finding that it was part of Jaffna income included in the remittances received at Rangoon from Jaffna and credited in the Rangoon Profit and Loss Ledger.

The sixth point is :—

“Assuming there is a book adjustment of the sum representing interest on amounts advanced by head office to branch business in foreign parts, whether the amount so adjusted (by debit and credit entries in the books of the head and branch offices) is assessable as income, profits or gains received in British India by the Head Office in Rangoon.”

The answer to this follows from the answer on the fifth point. The debit book entry of Rs. 1,22,233 in the accounts of the Rangoon Head Office representing interest on the amount advanced to Jaffna was not the authority for including this in the applicant's taxable income.

The seventh point is as follows :—

“Whether in view of section 24 of the Income-tax Act the assessee is or is not entitled to set off the loss in the foreign branch business as against the income of the Head Office (Rangoon) in British India.”

The answer to this is given in the note on the fourth point. The losses of a branch business outside British India do not concern the Indian income-tax authorities, any more than do the profits unless they fulfil certain conditions. As a matter of fact, it was not accepted by the Special Deputy Collector at Colombo that a loss has been proved, *see* the statement of the facts of the case.

The eighth point is as follows :—

“If the Court be of opinion that the book entry relating to Rs. 1,22,233 representing interest is to be regarded as income accruing from the branch business to the Head Office in British India, whether or not the assessee is entitled to an allowance representing the interest payment in respect of capital borrowed for the business under section 10, clause 2, sub-clause (iii), of the said Act.”

There seems to be a misunderstanding or a misrepresentation of the facts in regard to this. There was an advance of about Rs. 12,00,000 from the Rangoon Office to the Jaffna Branch. The bulk of this amount was borrowed by the Rangoon Office and the interest paid on this borrowed capital by the Rangoon Office has been allowed as a deduction from the Rangoon profits.

The ninth point is as follows :—

“Whether the assessee is liable to be assessed on the income or profits arising in British India (by the sale of *Thalam* paddy in Southern India), but received not in British India but by the branch business in foreign parts (Ceylon).”

The answer to this is that section 4 (1) of the Indian Income-tax Act, 1922, makes income accruing or arising in British India liable to tax.

The tenth point is as follows :—

“If the Court be of opinion that the income or profits referred to in item No. 9 *supra* is to be regarded as otherwise assessable, whether the assessee is not entitled to set off against the same the losses sustained by the branch business in foreign parts (Ceylon).”

There is no provision in the Income-tax Act for taking into consideration losses that occur in businesses outside British India. All that the Indian income-tax law is concerned with in respect of those businesses is as explained in the note on the fourth point above. Also the loss at Jaffna was not accepted as proved.

The eleventh point is as follows :—

“Whether in view of the provisions of section 34 of the Income-tax Act, it is open to the income-tax authorities to assess the firm as adjustment of income for the accounting year without giving a notice under section 34 to the assessee who succeeded to the businesses in Rangoon and Ceylon before effecting the said adjustment.”

The applicant's intention is hardly clear, but it would seem that he questions the applicability of section 34 to the assessment with which the present case is concerned. This is a point which the Assistant Commissioner of Income-tax, Rangoon, touched on in paragraph (7) of his order of the 20th May, 1924. The assessment

for 1922-23 was begun during 1922-23, but the assessment order was not passed till the 31st March, 1924 owing to the necessity for ascertaining the successors to the deceased person. When the order was passed, it was passed as an "Order under sections 23 (3) and 34 of the Income-tax Act." Section 34 appears to have been invoked unnecessarily in this case. The Income-tax Officer was in error in describing the assessment as one made under section 34. There is nothing in the Act which requires an assessment begun during the year in respect of which income-tax is payable to be completed within that year. The Income-tax Officer apparently overlooked the fact that, although section 14 (2) of the Income-tax Act, VII of 1918, required an assessment to be completed during the current year, there is no such provision in Act XI of 1922. In this section assessment should be read as denoting the whole process ending in the determination of the income for super-tax purposes, and, if such process has been instituted by the issue of a notice calling for a return of income, it cannot be said that the income in question has escaped assessment. The late Somasundaram Chettiyar, through the local agent, complied with all the requirements of the notices issued to him under sections 22 (2) and 22 (4), and there were no further particulars to be called for before making the assessment in the name of his successors. As the order of the 31st March, 1924 does not derive its validity from section 34, it follows that there is no necessity to discuss the question whether a notice under section 34 should have been issued to the applicant.

The twelfth point is :—

"Whether the assessee is liable to be assessed to income-tax and super-tax demanded of the assessee for the year 1922-23 and as adjustment of tax for the year 1921-22."

This is a general question, but seems to be intended to refer to the point dealt with in item (6) of the order dated the 20th May, 1924 of the Assistant Commissioner of Income-tax, Rangoon. As pointed out there, the proceedings for the 1922-23 assessment commenced during the year 1922-23, though final orders were passed only in March, 1924, and it was lawful under the second proviso to section 68, as inserted by Act XV of 1923, to make an adjustment of the tax provisionally levied in the 1921-22 assessment.

Keith, for the assessee.

The Government Advocate, for the Crown.

JUDGMENT.

This is a reference by the Commissioner of Income-tax.

A brief statement of the facts is necessary in order to elucidate the question which arises first for decision before us. The assessee and their father formed a joint Hindu family having property and business in Madras and branch businesses in Rangoon and Jaffna (Ceylon). By an arrangement come to between the members of the family so far as the Rangoon and Jaffna businesses were concerned, these became his father's personal businesses. He was assessed on them as his private businesses with which the joint family had no concern. The father died and these businesses reverted to the joint family. It was further arranged, by consent, that the Madras business should be assessed to income-tax at Madras, the Rangoon business at Rangoon and the Jaffna business at Ceylon. The Assistant Commissioner of Income-tax assessed the Rangoon business, and the assessee then moved the Commissioner to refer 12 points to the High Court. They deposited Rs. 100 as the fee required by section 66 (2). The Commissioner decided the first point holding it to be a pure question of fact, and refused to decide the other points as no separate fee

of Rs. 100 had been deposited in respect of each point. He refused to refer the point he had decided on the ground that it was purely a question of fact and not a question of law. The assessee then moved the High Court. In respect of the fee it was held that the fee laid down in section 66 (2) was in respect of each application, and that no separate fee in respect of each of the points raised in such application was chargeable. The Court was of opinion that it was not convenient to dispose of the point already decided by the Commissioner, and, consequently, proposed to call upon him to deal with the remaining 11 points as the questions raised appeared to overlap. The case was therefore returned to the Commissioner with the request that he would deal with the other points raised, and then refer the case or refuse to do so. It is clear that the Court did not direct the Commissioner to refer, but left it entirely to his decision as to whether the points were questions of law or purely questions of facts. The Commissioner, however, referred them though he was of opinion that no questions of law arose.

After we had heard Mr. Keith for the assessee for a short time it became apparent that he was seeking to contest the Commissioner's findings on certain facts and we called upon him to explain how it was open to him to do so. He argued that, unless he could show that the Commissioner had decided certain questions of fact without adequate material before him for his finding, and thus show that certain findings were wrong, he could not establish that questions of law, which he alleged, arise. He admitted that, out of the 12 points, there were only two, or possibly three, which could, in any sense, be described as raising questions of law. A reference to section 66 of the Act shows very clearly that the sole point that may be referred to the High Court and the sole questions which it is open to the High Court to consider and decide are questions of law. Sub-section 1 lays down that, if in the course of assessment under the Act "a question of law arises," the Commissioner may draw up a statement of the case and refer it for the opinion of the High Court. Sub-section 2 provides that the assessee in respect of whom an order under section 31 or section 32 of the Act has been passed, may apply to the Commissioner to refer "any question of law arising out of such order to the High Court." Sub-section 3 provides for the case in which the Commissioner refuses to state the case on the ground that no question of law arises, and permits the assessee to move the High Court to require the Commissioner to state the case. Sub-section 5 lays down that the High Court shall then proceed to decide the questions of law raised thereby. It is therefore abundantly clear, in my opinion, that the only matters which the Commissioner may refer or which he may be required to refer, and the only matters which the Court is authorised to decide, are questions of law. Some reliance was placed on sub-section 4 which lays down that, if the High Court is not satisfied that the statements in the case referred are sufficient to enable it to determine the question raised thereby, the Court may refer the case back to the Commissioner to make such additions thereto or alterations therein as the Court may direct. So far from this being any authority for the proposition that the High Court may deal with questions of fact, it seems clear to me to point to the necessity for the decision on the facts by the Commissioner, and I am unable to see how it can be argued on the wording of this sub-section, that the High Court can consider the facts, and then order the Commissioner to alter his findings of fact, and then refer the question of law.

What it was sought to argue before us was that the Rangoon branch sent to the Jaffna branch money and that the money so sent purported to be loans at interest to the Jaffna branch. But, as a matter of fact, it is a common practice well-known to every one that Chettiyar firms while purporting to charge interest on such loans to their branches and, whilst showing the interest in their accounts never, as a matter of fact, draw interest, the interest being only made up for the purpose of arriving at the commission which, at the end of the year, is due and payable to the local agents, and section 4 (2) and the explanation thereto is relied on.

It is no doubt true that the explanation provides that profits or gains accruing or arising without British India shall not be deemed to be received or brought into British India by reason of the only fact that they are taken into account in the balance sheet prepared in British India. It is very probable, but I do not wish to express an opinion on this, that it was the intention of the legislature to exempt such paper transactions and to allow them to be left out of account in arriving at the income-tax payable. But, in the present case, the Commissioner has found, and there is certainly evidence on which he could find, that interest was charged and that a sum of money, representing the amount of interest due, was paid by Jaffna to Rangoon. It was entered in the Rangoon books, and it appears that the Jaffna branch has claimed to take that alleged payment into consideration in Ceylon as a payment actually made. It cannot be permitted that the branch should be allowed to reduce its profits by showing a payment of interest to Rangoon and that the Rangoon branch should be allowed to claim that this sum should be subtracted from the profits on the ground that it was a mere book transaction.

However, in my opinion, it is perfectly clear that the High Court is only allowed, and can only decide what are properly so called, questions of law, and that it is not open to the Court to consider and reverse or modify the findings of the Commissioner as to what are pure questions of fact before it considers and decides questions of law. That being so, it was admitted that it was impossible to support the so-called questions of law and that the application must fail. For these reasons I am of opinion that the application fails and should be rejected, the order of the Commissioner being allowed to stand.

[122] IN THE COURT OF THE JUDICIAL COMMISSIONER AT NAGPUR.

Before Mr. Findlay, Offg. Judicial Commissioner and Mr. Wadegaonkar, Additional Judicial Commissioner.

[27th April, 1925.]

Pandit Pandurang	...	Assessee*
v.	...	
Commissioner of Income-tax, Central Provinces	...	Referring Officer.

Income-tax Act (XI of 1922), Sects. 13 and 66 (3)—Entry of interest in profit and loss account—If conclusive, irrespective of actual receipt—Entries of sawai or prospective interest in assessee's account—Assessee's liability thereon, if a question of law—Method of accounting, conclusiveness of.

The assessee in the course of his business used to make advances of grain and cash on *sawai* to his debtors and to take instalment bonds from them for the advance, plus *sawai* on it. The debtors were debited in the assessee's accounts with the bond amount inclusive of the added interest and in his *kasar khata*, profit and loss account, credit entries in respect of the *sawai* were made on the very day of the advance of the loan, i. e., before the *sawai* became payable. On an assessment to income-tax on the amount of the book profits appearing in his accounts, the assessee contended that he was not liable to be assessed on *sawai* or prospective interest, not actually realised by him or payable during the assessment period. On an application under Sec. 66 (3) for a reference on the question of the assessability of prospective interest.

Held, that the question whether particular entries on the credit side in the *kasar khata* constitute income assessable under the Act or not, is a question of law. Mere entries in books

* (1925) 21 N. L. R. 175; A. I. R. (1926) Nag. 180; 91 Ind. Cas. 980.

of account made for the purposes of calculating the profits of a business are not by themselves conclusive and the question as to what constitutes receipt for purposes of income-tax is a question of law and not one of fact.

Where the method of accounting regularly kept by the assessee does not reflect his true income, profits and gains, the taxing authorities must find out the true income under the proviso to Sec. 13 and cannot assess on imaginary sums not representing his true income, though entered in the assessee's accounts.

Civil Revision No. 234 of 1924, under section 66 (3) of the Income-tax Act (XI of 1922) against the order of Wali Mahommad, Esq., Commissioner of Income-tax, Central Provinces and Berar, dated 30th May, 1924.

M. Gupta with *A. V. Zinzarde*, for the assessee.

G. P. Dick, Government Advocate, for the Commissioner of Income-tax.

JUDGMENT.

Applicant Pandurang Ramachandra Pande of Kuhi, Tahsil Umrer, returned an income of Rs. 300 from house property and Rs. 3,783-2-8 from business for assessment during the year 1923-24. His return was not accepted by the Income-tax Officer, who sent for his account books and found his taxable income to be Rs. 300 from house property and Rs. 26,199 from business and made assessment on this income. On appeal the Assistant Commissioner of Income-tax allowed a deduction of Rs. 128-14-3 on account of *Amad Rafti* only from the business income of the applicant and ordered that for purposes of assessment, the income of the applicant from business should be taken to be Rs. 26,070-1-9. He was accordingly taxed on a total income of Rs. 26,370-1-9 for the year 1923-24. He then applied to the Commissioner of Income-tax under section 66 of the Income-tax Act of 1922 for a reference to the High Court. His contention was that he was not liable to pay income-tax on *sawai* or prospective interest which has neither been actually realized by him nor had become payable during the period for which assessment had been made. The Commissioner of Income-tax overruled his contention and declined to make a reference to the High Court on the ground that no question of law arose in the case. In doing so, he observed as follows :—

“The applicant has been maintaining his books of accounts on what is called the book profit system and as such the book profits are very clearly ascertainable from his books. For calculating the taxable income in such accounts a new provision has been made in the present Act under section 13. Such a provision did not exist in the Act of 1918. Under this section it is ordered that income, profits and gains shall be computed for the purposes of sections 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee. It has been admitted by the agent of the applicant that he had been applying this method of accountancy in the past and that he had even been taxed on this system of accountancy up till now. It seems to me that when the profits could be clearly ascertained from the method of accounting regularly employed by the assessee the Income-tax Officer was justified in computing the income that way. Hence the reference on point (1) to the High Court is unnecessary in the face of the specific provision of law for it. The main question in this case is a question of fact whether a particular system of accountancy is regularly employed and whether it gives the total income, profits or gains of the assessee. It has been said above that such is the case. The sum and substance of the applicant's contention is that he refuses to pay on what is called ‘book-profits’, but section 13 specially provides for such book-profits when that is the system of accountancy with any particular assessee. I think no point of law is involved in this case and I do not see any object to be gained in referring the matter to the High Court.”

The applicant has now moved this Court under section 66 (3) of the Act to call upon the Commissioner of Income-tax to state the case and refer it for the orders of this Court.

The facts of this case are not disputed before us and the only question which we have to decide at this stage is whether on the facts as admitted by both the parties a question of law arises justifying an order by us calling upon the Commissioner of Income-tax to make a reference to this Court. It is admitted by both the parties that the applicant makes advances of grain and cash on *sawai* to his debtors and takes instalment bonds from them for the cash or grain advanced plus *sawai* on it. For example, if he advances Rs. 100 to his debtor, he adds Rs. 25 on account of *sawai* to Rs. 100 and takes a bond for Rs. 125 from the debtor payable by certain instalments and debits Rs. 125 to his debtor's *khata* and credits Rs. 25 to the *kasar khata*. Similarly, if he advances 2 *khandis* grain to his debtor, he debits him with 2 $\frac{1}{2}$ *khandis* and credits $\frac{1}{2}$ *khandi* to the *kasar khata*. These credit entries in respect of *sawai* are made by him on the very day of the advance of the loan, i. e., before the *sawai* becomes payable. He says that the amount of *sawai* so credited to the *kasar khata* does not represent his income and that he makes credit entries in respect of *sawai* in the *kasar khata* with the sole object that the debit and credit entries in his account books may tally and not with the object of showing his profits. It is urged on behalf of the Commissioner of Income-tax that as these credit entries are made in the *kasar khata* which he treats as a profit and loss account, they must be regarded as entries in respect of income derived from business. We need hardly point out that for the purposes of calculating the profits of a business, mere entries in books of account are not by themselves conclusive, and the question as to what constitutes receipts for the purposes of the Income-tax Act, is, in our opinion, a question of law and not a question of fact. In *Gresham Life Assurance Society v. Bishop* (1), Lord Lindley has observed as follows:—

“My Lords, I agree with the Court of Appeal that a sum of money may be received in more ways than one, e. g., by the transfer of a coin or a negotiable instrument or other document which represents and produces coin, and is treated as such by business men. Even a settlement in account may be equivalent to a receipt of a sum of money, although no money may pass; and I am not myself prepared to say that what amongst business men is equivalent to a receipt of a sum of money is not a receipt within the meaning of the statute which your Lordships have to interpret. But to constitute a receipt of anything there must be a person to receive and a person from whom he receives, and something received by the former from the latter, and in this case that something must be a sum of money. A mere entry in an account which does not represent such a transaction does not prove any receipt, whatever else it may be worth.”

Similarly in *In re, Aurangabad Mills, Ltd.* (2), Shah J., has observed: “It is clear that the mere fact of the entries being made for the purpose of proper accounting would not entitle the Collector to treat the profits as having been received in British India within the meaning of section 3 (1) of the Act (VII of 1918).” Again in *Commr. of Income-tax v. Pydah Venkatachalapathy* (3), it has been held that where compound interest is payable by a debtor to a creditor with yearly rests and the creditor makes entries in his books of account adding to the principal amount the interest which has accrued due at the end of the year, but does not receive payment either in cash or by counter credit in the debtor's accounts, a mere entry of such interest in his books of account does not make such interest taxable income within the purview of the Income-tax Act.

(1) (1902) A. C. 287 at p. 296.

(2) (1921) 1 I. T. C. 116; 45 Bom. 1286.

(3). 1 I. T. C. 185.

It is significant to observe that the word 'income' has nowhere been defined in the Income-tax Act of 1922. Probably, the legislature deliberately omitted to define that word and left it to the taxing authorities and Civil Courts to determine in each case what was income for purposes of taxation under the Act. Consequently, it seems to us that the question whether particular entries on the credit side in the *kasar khata* constitute income or not when there is no dispute in regard to the meaning of those entries and the circumstances under which they were made is a question of law.

In this connection, we should like to observe that the Income-tax Act of 1922 applies to all *income, profits or gains* as described or comprised in section 6 of that Act, from whatever source derived, accruing or arising or received in British India (*vide* section 4 of the Act). Section 6 mentions the several heads of taxable income one of which is 'Business' with which we are concerned in the present case and section 10 describes the way in which income derived from business should be calculated. That section enacts that income-tax shall be payable by an assessee under the head 'Business' in respect of the *profits or gains* of any business carried on by him. The profits or gains of a business are, generally speaking, the difference between the receipts and the expenses incurred in earning them. In *Russel v. Town and County Bank* (1), Lord Herschell has observed:—

"The profit of a trade or business is the surplus by which the receipts from the trade or business exceed the expenditure necessary for the purpose of earning those receipts."

Can credit entries in regard to *sawai* which has neither been realized nor has accrued due be regarded as representing income, profits or gains from business? The word 'income' signifies what comes in and includes sums which though not actually realised have become due in such a manner that the assessee could at his will and pleasure receive them for reinvestment or otherwise: per Sadasiva Aiyar, J., in *Secretary to the Board of Revenue, Madras v. Arunachalam Chettiar* (2). But in the present case, the *sawai* credited to the *kasar khata* had admittedly not become payable. It was credited to the *khata* on the very day of the advance of the loan. It would become due after several years and when it becomes due, the applicant may not succeed in realizing it at all or may succeed in realizing only a small portion of it. Under these circumstances, is it just, legal and equitable to treat the entire *sawai* as income taxable under the Income-tax Act? This in our opinion raises a question of law.

In a very recent case decided by the Privy Council, *St. Lucia Usines and Estates Co. v. St. Lucia* (3), Lord Wrenbury has observed:—

"The words 'income arising or accruing' are not equivalent to the words 'debts arising or accruing.' To give them that meaning is to ignore the word 'income'. The words mean 'money arising or accruing by way of income.' There must be a coming in to satisfy the word 'income' If the tax-payer be the holder of stock of a foreign Government carrying say 5 per cent. interest, and the Government is that of a defaulting state which does not pay the interest, the tax-payer has neither received nor has there accrued to him any income in respect of that stock. *A debt has accrued to him but income has not.* It does not follow that income is confined to that which the tax-payer actually receives. Where income-tax is deducted at the source the tax-payer never receives the sum deducted but it accrues to him." In this view of the legal aspect of the case, it is in our opinion idle to contend that the question raised in the petition of the applicant is not a question of law.

(1) (1888) A. C. 418 at p. 424.

(2) 1 I. T. C. 75; 44 Mad. 65.

(3) (1924) A. C. 508 at p. 512.

Section 13 of the Income-tax Act of 1922, on which reliance has been placed on behalf of the Commissioner of Income-tax, does not in our opinion affect this case. That section says that income, profits and gains shall be computed for the purposes of sections 10, 11 and 12 in accordance with the method of accounting regularly employed by the assessee. It is clear from the proviso to this section that the method of accounting regularly employed by an assessee for the purpose of his business should reflect his true income, profits and gains. If it does not, the taxing authorities must find out the true income of the assessee as, after all, income-tax is leviable on income, profits and gains and not on imaginary sums which do not represent the true income of the assessee. The applicant contends that the credit entries in regard to *sawai* made in the *kasar khata* do not represent his income as no portion of the *sawai* so credited was either received by him or had become payable to him. On the other hand, it is contended on behalf of the Income-tax Commissioner that as *sawai* was credited in the *kasar khata*, it was rightly taken into account in determining the applicant's income. In other words, while there is no dispute between the parties in regard to the facts of the case, each wishes to draw his own inference from those facts and to interpret the entries in the *kasar khata* to suit his own case. This raises a question as to which of the two inferences is the correct inference and which is the proper mode of construing *sawai* entries in the *kasar khata*. Such a question is a question of law.

It has been held by their Lordships of the Privy Council that the proper legal effect of a proved fact is a question of law : *Nafar Chandra Pal v. Shukur* (1). In *Ramgopal v. Shamskhaton* (2), Sir Richard Couch has observed : "The facts found need not be disputed. It is the soundness of the conclusions from them that is in question and this is a matter of law." Similarly, in *Krishnaswami Aiyangar v. Subramania Ganapatigal* (3), Phillips, J., has held that the interpretation of a document is a question of law. We are accordingly of opinion that a question of law does arise in the case and that the Income-tax Commissioner was bound to make a reference to this Court as desired by the applicant. We therefore call upon him under section 66 (3) of the Income-tax Act, to state the case in terms of the applicant's petition presented to him on 12th April, 1924, and refer it to this Court. Costs of this application will be borne by the Income-tax Commissioner. Pleader's fee Rs. 50.

[123] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Victor Murray Coutts Trotter, Kt., Chief Justice, and
Mr. Justice Srinivasa Ayyangar.

[27th April, 1925]

The Commissioner of Income-tax, Madras

... Referring Officer.

v.

M. Sankara Aiyar

...

Assessee.

Income-tax Act (XI of 1922), Sec. 23—Assessee found to trade in diamonds in previous year—Mere denial of trade by assessee—Assessment on basis of existence of trade capital not accounted for—If proper—Burden of proof.

The assessee, found by the Income-tax Officer in a previous assessment to have had in his hands a certain amount of capital invested in diamond trade, was called upon by the Income-tax Officer in the current year of assessment to give an explanation as to what he

(1) (1918) I. L. R. 46 Cal. 189 (P. C.).

(3) (1917) 35 M. L. J. 304.

(2) (1892) I. L. R. 20 Cal. 93 at p. 99 (P. C.).

had done with the money found to be so employed. The assessee merely repeated the statement disbelieved already that it never existed, whereupon the Income-tax Officer put to him that unless the contrary was proved, he should assume that that money had been transferred as capital to the business of moneylending admittedly carried on by the assessee. On an assessment to income-tax on the above basis,

Held, that there were materials on which the Income-tax Officer would be justified in his finding as to the existence of the sum of money in the assessee's hands and assessing him accordingly.

Case [Referred Case No. 17 of 1924] stated under section 66 (3) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Madras, in compliance with the order of Court, dated 30—9—1924 and reported in 1 I. T. C. 395.

CASE.

As ordered by the Hon'ble Mr. Justice Kumaraswami Sastri in his order, dated 30—9—24, a copy of which was communicated to me by the Pleader for the petitioner on 1st November, 1924, I have the honour to submit the following question for the decision of the High Court under section 66 of the Income-tax Act.

"Whether in cases where the Income-tax Officer is not prepared to act on the accounts produced, or the statement, or the evidence of the assessee, he can assess without any evidence [on record, or whether he is bound to inform the assessee] as to how he proposes to assess him and the information he has received on which he proposes to act and to call evidence so as to allow the assessee an opportunity of showing that such information or evidence is incorrect and ought not to be acted upon."

2. In regard to the form of the question, I may say that I have not received any formal requisition from the High Court, and that the question as given above is taken from a certified copy of his Lordship's judgment. In an authorised copy of the High Court's order served upon me by the petitioner's Vakil the words given in square brackets above do not appear. As the omission of these words renders the question almost meaningless, I have ventured to include them.

3. The question as thus framed cannot, I submit, be treated as one question, and in giving my opinion, I shall therefore consider two separate problems, the solutions of which I hold to be widely different.

4. The case postulated is one in which the assessee, in response to the Income-tax Officer's notice issued under section 23 (2) of the Act has produced a set of accounts from which, in the opinion of the Income-tax Officer, the income, profits or gains of the previous year cannot properly be deduced. It is assumed that, so far as the Income-tax Officer is aware, the accounts produced are the only ones maintained; in other words, that the assessee is not known to be withholding accounts with the object of evading taxation. If the Income-tax Officer had reason to believe that any such suppression of evidence had taken place, he could proceed under section 23 (4) and deprive the assessee of his right of appeal. It is assumed here that the conditions justifying the use of this power do not exist and that the Income-tax Officer is nevertheless compelled to compute the income, not on the basis of the accounts, but "upon such basis and in such manner as the Income-tax Officer may determine" (Section 13). These words taken by themselves appear to give the Income-tax Officer power to make the assessment, if he so chooses, in a completely arbitrary manner. His Lordship's judgment suggests, however, that this power may be restricted by words used elsewhere in the Act.

5. The first suggestion is, in the learned Judge's own words that, under the conditions given, an Income-tax Officer is bound to "give the assessee information as to the basis on which he acts so as to entitle the assessee to meet the case

put forward by the Income-tax Officer." I may say at once that, whether or not the Income-tax Officer is under any such legal obligation (and I can find no explicit statement in the Act on this point) he in practice invariably does furnish the assessee with the fullest possible account of the basis and manner of his computation, and does give the assessee an opportunity of showing that the result is incorrect. This is the practice of the Department, and is clearly equitable. The assessee has made an attempt to prove his income and has failed, possibly through no fault of his own; it is therefore just that he should be allowed to criticise the basis on which the Income-tax Officer proposes to assess. This enables the Officer to make his final order under section 23 (3) with a full knowledge of the assessee's point of view, and further enables the Assistant Commissioner to form a proper estimate of the merits of the case when he deals with it on appeal. If, therefore, it be held that this practice is legally binding on the Department, no objection can be raised from the administrative point of view.

6. The second suggestion is that in making his computation the Income-tax Officer should "act upon legal evidence," and should "enable the assessee....to show . . . that the witnesses on whose statements the Income-tax Officer acts ought not to be believed." If I understand this aright, it amounts to saying that the Income-tax Officer, who in the terms of section 37 of the Act is conducting a "judicial proceeding," should be not merely a Judge but a party to the proceeding with the assessee as the opposing party; and that when the plaintiff has failed to prove his case the Income-tax Officer, as defendant, should set up a case of his own by adducing evidence, and should then, as Judge, decide whether he, as defendant, has proved his own case. I submit that this position has only to be stated for its absurdity to be manifest. It appears to rest upon a false analogy between two essentially different kinds of judicial proceedings. In an ordinary civil suit there are two parties. Each party is responsible for proving certain facts and the object of the proceeding is to determine which of those facts are true and what consequences follow therefrom. If a fact has to be proved by a party and the party does not prove it, the Judge will hold that fact to be untrue or not proved, and that concludes his duty so far as that particular fact is concerned. But in an income-tax proceeding there is only one party and the object of the proceeding is to determine his income as accurately as possible. The facts to be proved are facts especially within the knowledge of the party, and the burden then must rest upon him and upon him alone (Indian Evidence Act section 106). Should he fail to discharge this burden, the Judge may not conclude the case with a finding of "not proven" but is bound by law to compute the income of the party on such basis and in such manner as he, the Judge, may determine (Indian Income tax Act section 13). This cannot however be held to mean that the Judge is bound to place on record legal evidence to justify his computation.

7. The fact that an Income-tax Officer is bound to compute the income from the materials laid before him, however defective those materials may be, is a peculiar feature of income-tax proceedings which distinguishes them sharply from an ordinary civil trial. The point may perhaps be emphasised by quoting the words used by the Lord President of the Court of Sessions in the case of *Macpherson and Co. v. Moore* (1): "Messrs. Macpherson and Co., . . . if they do not choose, as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown." Dealing with the same point, Lord Mackenzie said:—

"With regard to the Solicitor-General's observation upon the practical difficulty of finding out the amount of the profits upon which the assessment is to be

(1) 6 Tax Cas. 107 at p. 113.

laid, I can only say this, that it is not necessary to arrive at any satisfactory conclusion upon that matter because it is not a matter with which the Court is concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory method or not" (P. 115).

8. Under the Indian Income-tax Act, section 23 (3), the Officer is entitled, after hearing the party's evidence, to hear "such other evidence as he may require, on specified points;" that is to say, he can call upon the party to prove or disprove specified allegations of fact the truth or untruth of which is not established by the evidence on record; and I submit that he should take this course whenever it is likely to help him in the attainment of his object of determining the income. But when the party, with or without the help of this additional evidence, has failed to satisfy the Income-tax Officer of the amount of his income, it is ludicrous to suppose that the positions of judge and party are reversed, and that the judge must prove that the party has failed to prove.

9. That the party's evidence, even if unrebutted, is not conclusive, is borne out by the judgment in *Stocks v. Sulley* (1). The question in that case was whether the annual rental value of a building was £ 19-10sh. as asserted by the party, or £40 as determined by the Burg Assessor. The party offered as his sole evidence a deed of lease. The Lord President said: "They (the Commissioners) were not offered any evidence beyond the case, and that seems to have been the deliberate policy of this appellant. Accordingly the Commissioners, I think, were not only well entitled but were forced by his own proceedings to avail themselves of their own knowledge, and the conclusion they came to was that the rent did not represent the true value of the property and in so acting I think they were perfectly right." The other Judges commented similarly on the case, for instance Lord Kinnear said: "The appellant produced a lease to the Assessor which the Assessor did not think conclusive, and which he did not adopt as the basis of the assessment. That the Assessor was perfectly right in that view of his duty I think is hardly disputed." It does not appear that in this case any attempt was made to rebut the evidence of the lease by any other evidence. The lease was held to be inconclusive, the Assessor fixed the value of the house to the best of his judgment, and the Commissioner supported this valuation without taking evidence as to its correctness.

A Judgment of the Allahabad High Court, *In the matter of Lachhman Das, Narain Das of Cawnpore* (2), pronounced so recently as July, 28th 1924, shows that the same principle of law applies to assessments under the Indian Income-tax Act. In that case no evidence was called for the Crown; the only evidence before the Income-tax Officer was that tendered by the assessee. The Income-tax Officer in the light of his special knowledge and experience considered all this evidence, but did not regard it as proving the figure of income shown in the return. He held, in particular, that the amount of loss claimed as due to wastage was excessive. In the words of the Acting Chief Justice, "weighing all these various facts in the scale, he came to the conclusion that the fair thing to do was to assess them at the figure which he ultimately decided." The Judges held that the assessment had been legally made and that no question of law arose.

10. The view taken in these two cases, i. e., *Stocks v. Sulley* (1) and *In the matter of Lachhman Das, Narain Das of Cawnpore* (2), is, in my opinion, the only possible construction to be placed upon the words of the statute. It is also the only construction, though this fact is perhaps irrelevant when questions of pure law are being discussed, which will enable the Act to be administered efficiently

and fairly. If it is once admitted that an assessee can shift on to the assessing authority the burden of adducing legal proof of his income, it will be easy for the dishonest assessee to avoid bearing his fair share of contribution to the revenue; for it will then be to his advantage to do what the petitioner has done in the case now before their Lordships, namely, to produce defective accounts and then defy the Income-tax Officer to prove (a) that the accounts are defective and (b) what the amount of his income was. In this case, as will be seen, the Income-tax Officer was able to satisfy himself that the accounts produced were not merely defective, but fraudulent. But he was not able to prove the exact amount of the petitioner's income, and from the very nature of the case he could not be expected to do so. He was therefore compelled to make a rough computation based on the materials to be described later. It is not claimed that this computation was accurate but that, as in all such cases, it was made as carefully and accurately as the circumstances allowed.

11. The attention of their Lordships will doubtless be invited to the ruling of the Calcutta High Court in the case of *Bishnu Priya Chowdhurani* (1), in which the then Commissioner of Income-tax, Bengal, held, and the High Court accepted the view, that in the circumstances now under consideration, "the burden of proof is on the party which would fail if no evidence were produced, i. e., on the Officers of the Income-tax Department." Regarding this it is sufficient for me to say that I consider, with all respect, that Mr. Blandy's opinion and the decision based thereon were unsound; that the Income-tax Officer is not a party to the judicial proceedings over which he presides; and that if it were possible to regard him as a party, the rule of evidence to be applied would be that formulated in section 106 of the Indian Evidence Act.

12. The facts of the present case are :—

Some years ago the petitioner M. Sankara Aiyar was a humble cook, in which capacity he served the Hon'ble Mr. Justice Kumaraswamy Sastri. He is now a wealthy man with shares in at least 5 different banks and in various companies. He owns a flourishing hotel and can afford to lend out substantial sums at interest. During recent years, he has been returning his income at about Rs. 3,000 per annum. In the assessment for 1923-24 now under consideration, he returned an income of Rs. 9,317 (though he finally admitted Rs. 11,081 as the true figure) gave a list of the moneys he had outstanding, solemnly swore that he had made no other loans and challenged the Income-tax Officer to find any other instance. The Income-tax Officer who had already issued a draft order of assessment on which he had invited the petitioner's objections, happened to find one omission from the assessee's list of outstanding loans. This omission was put to the assessee on 13th February, 1924. In the presence of his Pleader, Mr. M. Subbaraya Aiyar, the assessee stated that the loan in question was repaid in 1921-22. The assessee was asked to produce evidence on this point. The next day he appeared and showed the Income-tax Officer page 299 of his ledger which contained an account the heading of which ran:—"Account relating to the mortgage of house No. 17 Anna Pillay Street." The Income-tax Officer knew that when he had seen the ledger before, the entry had not been there. The ink was fresh and the corresponding entry did not appear in the day book. There is no doubt, indeed it is not denied, that the entry was made subsequent to 13th February, 1924. The Income-tax Officer accordingly passed his final order on 19th February, 1924. A copy of this order is enclosed marked Exhibit A.* In this order the Income-tax Officer has given full and convincing reasons for holding that the accounts are incomplete and has gone on to say that he estimated the money-lending income to be Rs. 10,000. The reasons which influenced the Income-tax Officer to adopt that figure instead of the

(1) 1 I. T. C. 261; 50 Cal. 907.

* Not printed.

figure Rs. 2,598 put forward by the assessee are not stated in detail in the order of the Income-tax Officer. The records, however, show that the Income-tax Officer's reasons were :—

(1) the vague general information that the assessee's money-lending dealings were much larger than admitted by him, coupled with the fact that the assessee had risen in a comparatively few years from a position of poverty to one of affluence and therefore presumably had some secret source of income;

(2) the fact that one item of money-lending had been omitted from the assessee's accounts and that in the Income-tax Officer's opinion forgery and perjury had been committed with regard to it. The Income-tax Officer felt that there were probably many other items regarding which he had been unable to obtain information; and

(3) the records before him which proved that the assessee at one time carried on diamond trade. He argued that the funds formerly invested in the diamond trade must have been diverted to money-lending. As the assessee now declares that he never carried on any diamond trade, it is necessary to enter into this point in some detail. In connection with his assessment in 1921-22 a full enquiry was held and witnesses were examined and cross-examined by Vakils on the question whether the assessee had carried on diamond trade in the previous year. As a result of that enquiry the Special Income-tax Officer had held that the assessee had carried on diamond trade and levied a penal assessment on it. The assessee did not appeal against that penal assessment. A copy of the order of the Special Income-tax Officer is enclosed marked B*. In the face of that order, which was before the Income-tax Officer and which from his point of view was final, he was entitled to regard it as certain that the assessee had at one time carried on diamond trade. Again in connection with the assessment proceedings for 1922-23 the assessee had given a singularly guarded statement regarding his diamond trade. While submitting "that he had at no period of his life been a trader in diamonds," he admitted that "he casually and at rare intervals used to dispose of, when he was in need of cash, such diamonds which he might have previously purchased and which he might after such purchase be no longer disposed to retain or which others might desire of him to sell to them, at their cost price approximately and with no view to make any profit out of such transaction". That statement practically admits the existence of diamond trade at one time and naturally leads to the Income-tax Officer's presumption of the existence of some hidden capital. Although these reasons were not stated in full in the order of the Income-tax Officer, there is not a shadow of doubt that they were known to the assessee and his Pleader, as there were discussions between the Income-tax Officer, the assessee and the Pleader on several occasions prior to the assessment. On receipt of the assessment order the petitioner appealed to the Assistant Commissioner urging that the accounts were complete and should have been accepted. The order of the Assistant Commissioner on the appeal is enclosed marked C*. A demand for a reference to the High Court was then submitted. The Commissioner's order on that is enclosed marked D.*

13. While I admit that in this case the assessing Officer had very little reliable material on which to act, I would urge that the materials available justified the adoption of a figure higher than that put forward by the assessee. The assessee was certainly a man of means. He apparently had some hidden sources of profit. It was clear that no reliance could be placed on any of his sworn statements; he has not scrupled to deny the repayment of Rs. 10,000 by Narayanappa Nayudu and has later interpolated an entry regarding it in his accounts. He persisted in denying that he had ever carried on diamond trade, though a final finding had been recorded in 1921-22 that such trade had existed. In such circumstances, the Income-tax Officer, in fairness to the honest tax-payer had to enhance the figure

under money-lending far enough to cover other possible omissions. The remedy for any over assessment that may have occurred is in the hands of the assessee and it is to put in honest returns in future and refrain from wilful misrepresentation.

Nugent Grant, counsel for the Crown.

A. Krishnaswami Aiyar and *M. Subbaraya Aiyar*, for the assessee.

JUDGMENT.

The Judgment of the Court was delivered by

COUTTS TROTTER C. J.—In this case one of the points taken for the appellant, the assessee, is that a ground on which his assessment has been enhanced, is one that was not brought to his notice and which he had no opportunity of dealing with before the 10th April, 1924, when the enhancement of his assessment was finally confirmed. The point he desires to argue is that that, if established, would vitiate the conclusion come to by the Income-tax Officers. He says that he is entitled to be put on his guard in a matter of that kind. The facts as suggested are these: that in the assessment of the previous year it was suggested and denied by him that he had at one time engaged in dealings in buying and selling diamonds, that it was found against his contention on the evidence that he had been dealing in diamonds and that he had either gone on dealing in diamonds or that a sum of money, which represented the capital he must have been held to have had invested from time to time in diamonds, if not still used in the diamond trade, must be held to be used by him in some other productive form as capital, money-lending or the like. His contention of course, apart from the question of notice which I have dealt with, is that there is no evidence properly before the Court that would justify the finding which the Commissioner has made. That is a wider question on which at this stage we do not desire to express any opinion. We shall assume for the present purpose that, if substantiated, that would be an answer to the assessee but we are not going to decide a point of such wide bearings unless we are really satisfied on an ascertainment of the true facts and full materials in this case whether it is really necessary for our decision or not. It cannot be disputed that, if this man had been found to have in his hands a surplus income which he had not accounted for in the previous years and that if when he comes to the current year's assessment he declines to give any explanation at all as to what he has done with his money and merely repeats his statement which was disbelieved a year before that it never existed, there would be some material on which the income-tax authorities would be justified in finding that this sum of money was still in his hands. That is subject to the contention of the appellant that if that is the case that is to be brought against him, he must have fair notice of it so that he should be in a position to deal with it. I am not myself sure that that is so, but in order to avoid useless discussion in a certain event and further to avoid this man having any grievance as to the full facts not having been put before the Court, we shall adjourn this case till Monday next to enable evidence to be given one way or the other as to whether or not before the final determination on the 10th April, 1924, as to the amount of income to be assessed, it was brought to the notice of this assessee or of his legal advisers that the case would be framed against him on the assumption that he would have to account for the use he had made of the capital which had been found to be unaccounted for in his hands in the previous year, namely, money which was at one time found by the authorities to have been employed in the traffic of diamonds. Both sides will file their affidavits by Friday next.

An affidavit is now put in by Mr. Venkateswaralu Pantulu, Income-tax Officer, which contains categorical statements which the assessee is not prepared to deny. The effect of those statements is that the Officer put it before the assessee that, having regard to the fact that he had been found on a previous assessment to have a certain amount of capital invested in trading in diamonds which had not been

accounted for, he should assume unless the contrary were proved that that money had been transferred as capital to the only business which the assessee admittedly carried on, namely, money-lending. In these circumstances the question referred to us does not arise. There is no point of law raised in the case and all we can do is to dismiss this reference. No order as to costs.

[124] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA:

Before Mr. Justice Chatterjee, Mr. Justice Ghose and Mr. Justice Cuming.

[25th May, 1925.]

Messrs. Harisingh Santokchand

... *Assesseees.*

v.

Commissioner of Income-tax, Bengal

... *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 2 (6)—Indian Finance Act of 1924, 2 (a) (i), Part II, Sch. III—Hindu family—Members carrying on ancestral business—Separate appropriation of profits in defined shares—Individual dealings and capital account—If constitutes a joint family business.

The assesseees, members of a Hindu family, originally joint in mess and worship, carrying on an ancestral business, stated to the Income-tax authorities that they were partners of the business. There was no capital account in the name of the family as a joint one, but separate capital accounts and separate dealings in the names of the individual members. The account books showed that the profits of the business were not distributed equally between the assesseees but in the proportion of 5/8 and 3/8 and there was separate enjoyment of the income and separate appropriation of the profits according to defined shares. On the contention of the assesseees to be assessed as a joint Hindu family business,

Held, that on the facts stated above, the assesseees cannot be held to be a joint Hindu family coming within the provisions of 2 (a) (i), Part II, Sch. III of the Indian Finance Act and they must be assessed as an unregistered firm.

Case referred under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the decision of the Court by letter No. 6343 C. T., dated the 14th March, 1925.

CASE.

I would refer for the decision of the High Court under section 66 (2), Income-tax Act (XI of 1922), the question of law which arises on the following facts:—

2. There is a firm by name Harisingh Santokchand which has been assessed for years past as an unregistered firm. In 1924-25 it claimed that it should be assessed as a joint family business and that therefore when it was assessed to super-tax, the tax on the first Rs. 75,000 of its income should be *nil*. This claim was rejected last year (for reasons which do not apply altogether to the present case) but has been renewed this year both before the Income-tax Officer, and in appeal, before the Assistant Commissioner of Income-tax, Calcutta, who by his order, dated 18th November, 1924, under section 31 of the Income-tax Act, rejected the claim of the assessee to be a Hindu undivided family and held that there was a partnership business belonging to two proprietors. The application for a reference was filed on 23rd December, 1924, but it was not till the end of January that I was able to hear the Pleader for the appellant and examine the judicial decisions he produced in support of his claims that the assessee in this case ought to be considered a Hindu undivided family and not an unregistered firm.

3. Apparently this assessee's business has been in existence for several years and was founded by one Harisingh who had two sons—Balchand and Santokchand. Harisingh died about 28 years ago and his wife died about 20 years ago. Of the two sons, Balchand has a son named Malchand, while Santokchand who died about November 1924 has no issue. It is not disputed that the family was originally joint in food, mess and worship. Whether it is so now, I have no means of knowing, as the family residence is in Bikanir. What is disputed is that the business conducted in the name of Harisingh Santokchand is the business of the Hindu undivided family. The Income-tax Officer and the Assistant Commissioner of Income-tax, Calcutta, have both held that the business is not that of the Hindu undivided family but that of a firm, and that the firm must be assessed as an unregistered firm and not as a Hindu undivided family and cannot be allowed the benefits of the provision of section 2 (a) (i) of Part II of Schedule III of the Indian Finance Act, 1924. The assessee has asked that this question of the proper method of assessment in his case shall be referred to the Hon'ble High Court for its decision.

4. I find from the account books of the firm (1) that in the accounts of this business there is no capital account of the alleged Hindu undivided family; (2) that there are capital accounts of two members of the alleged Hindu undivided family; (3) that interest is paid on these capital accounts by the business to each of these two individual members of the alleged Hindu undivided family; (4) that each of these two individual members of the alleged Hindu undivided family has separate dealings with a firm in Bikanir which are entered in their individual names.

5. From the assessment records of the firm I find (1) that in 1920-21 when there was an assessment to super-tax and a deduction of Rs. 50,000 was allowed, no objection was raised by the assessee to the assessment and no claim was made that the deduction should be increased to Rs. 75,000 as the business was an undivided Hindu family business; (2) that in similar circumstances in 1923-24 no claim to be a Hindu undivided family was made before the Income-tax Officer and that it was only made before the Assistant Commissioner of Income-tax, Calcutta, by a supplementary petition filed before the Assistant Commissioner at a late stage of the proceedings before him in connection with an appeal under section 30 filed against the refusal of the Income-tax Officer to re-open under section 27 the assessment which had been made under section 23 (4) and that prior to this claim being made, the assessee had submitted statements of accounts showing "profits distributed among partners"; (3) that in 1920-21 and 1921-22 the assessee when given an opportunity of stating the names and addresses of (1) the partners in the firm, (2) the adult male members of the family, did not state the names of the latter but stated the names of the partners of the firm as Balchand and Santokchand; (4) that in 1921-22 this statement regarding the partners in the firm was made by Balchand's son, Malchand who, had the business been that of a Hindu undivided family, was a co-parcener; (5) that no claim to be a Hindu undivided family appears on any return filed by the firm under any of the Income-tax Acts until made on the return filed on the 18th August, 1924; (6) that in an affidavit declared on the 13th November, 1923 the *munim* of the firm declared: "1. That Babu Balchand and Babu Santokchand are the two proprietors of my firm of Messrs. Harisingh Santokchand"; and (7) that the statements of accounts for the year 1979 Samvat ending Ramanavami attached to that affidavit show that the profits of the business for that year were distributed among the partners not equally but in the proportion, Balchand Malchand 6 annas share, Santokchand 10 annas share.

6. On these findings of fact the question is whether the firm of Messrs. Harisingh Santokchand should be assessed as an unregistered firm or as a Hindu undivided family. My opinion is that the business is that of an unregistered firm and I base this opinion on the following conclusions derived from the above facts. I

do not deny that a Hindu undivided family can have a business of its own. But I submit that my findings of fact justify the conclusion that there is separate enjoyment of the income of this business by the two partners Balchand and Santokchand and that there is separate appropriation of profits by each of them. This has frequently been held to be good evidence of a tacit agreement among members of a Hindu undivided family to hold their property according to their separate shares and is totally incompatible with the claim of the assessee to be a Hindu undivided family and to be entitled to the preferential treatment accorded to such by item 2 (a) (i), Part II of the Schedule III appended to the Indian Finance Act, 1924. I submit, therefore, that the question of law referred to the High Court for decision should be answered to the effect that the firm of Harisingh Santokchand should be assessed as an unregistered firm and not as a Hindu undivided family.

JUDGMENT.

CHATTERJEE J.—This is a reference under section 66 (2) of the Income-tax Act (Act XI of 1922) and the question referred is whether the firm of Harisingh Santokchand should be assessed as an unregistered firm or as a joint Hindu family business. If it is the latter they would be entitled to a deduction for the purpose of assessing the super-tax to the extent of the first twenty-five thousand rupees.

The facts are stated by the Commissioner of Income-tax. It appears that in 1920-21 and 1921-22 when the assessee were called upon to state the names and addresses of the partners of the firm, it was stated that the partners of the firm were Balchand and Santokchand, and the *munim* of the firm declared that those two persons were the proprietors of the firm. The statements of accounts showed that the profits of the business were distributed among the partners not equally but in the proportion, Balchand 6 annas share, Santokchand 10 annas share. It appears therefore that there was separate enjoyment of the income and separate appropriation of the profits of the business by the two partners Balchand and Santokchand according to the separate shares of each which were unequal. On these facts it cannot be held that it was a Hindu joint undivided family so as to attract the provisions of 2 (a) (i), Part II of Schedule III of the Indian Finance Act, 1924.

The firm should accordingly be assessed as an unregistered firm and not as a Hindu undivided family business.

The petitioners must pay the costs, the hearing fee being assessed at ten gold mohurs.

GHOSE J.—I agree..

CUMING J.—I agree.

[125] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Macpherson.

[8th June, 1925.]

Raja Rajendra Narayan Bhanja Deo of Kanika ... *Assessee*.*

v.

Commissioner of Income-tax, Bihar and Orissa ... *Referring Officer.*

Income-tax Act (XI of 1922) Sec- 29—Limitation for issue of notice—Demand notice not issued during financial year—Assessee, if can be assessed later—Reasonable time.

Under Sec. 29 of the Income-tax Act, no period is prescribed within which a notice demanding income-tax is to be issued and therefore *prima facie* a notice issued about 14 months after the expiration of the year of assessment would not necessarily be too late.

* (1926) I. L. R. 5 Pat. 13; (1925) P. H. C. C. 217; A. L. R. (1925) Pat. 581; 91 Ind. Cas. 288.

The mere fact that the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, is not tantamount to an enactment that it cannot be issued afterwards. Although no time is prescribed for issuing the notice, yet the notice must be issued within a reasonable time. What would be a reasonable time would vary according to circumstances.

Case [Miscellaneous Judicial Case No. 30 of 1925] referred by the Commissioner of Income-tax, Bihar and Orissa, under section 66 (2) of the Income-tax Act for the opinion of the High Court.

CASE.

The question for determination of the High Court is whether when in the year 1922-23 the Income-tax Officer only made an adjustment in respect of the income of 1921-22 and made no demand for the assessment of 1922-23, the Income-tax Officer can in the year 1923-24 make the omitted demand.

2. The facts are as follows:—

In 1922-23 the Collector as Income-tax Officer determined the income of 1921-22 of the assessee (Raja Rajendra Narayan Bhanj Deo of Kanika) to be Rs. 67,490 and passed an order, dated October 31, 1923, "assess to Rs. 2,805-0-0, income-tax and Rs. 1,093-2-0, super-tax." As the assessee had been provisionally assessed in 1921-22 on an income of Rs. 1,55,181 and had paid income-tax and super-tax amounting to Rs. 9,715-14-8 and Rs. 8,460-2-0 respectively, and adjustment was made under section 68 of the Indian Income-tax Act, 1922, which resulted in a refund of Rs. 14,277-14-8 but no demand notice under section 29 for the income-tax and super-tax due in the year 1922-23 was made. On January 26, 1924, the Income-tax Officer ordered the issue of a notice under section 34 of the Act on the ground that the income of 1921-22 had escaped assessment under the Act of 1922 and ultimately issued a demand notice for Rs. 2,805, income-tax and Rs. 1,093-2-0, super-tax.

3. It is desirable to explain the assessment procedure under the Income-tax Act of 1918. Under that Act the income of (say) 1920-21 was provisionally assessed in 1920-21 but as the income could not be accurately known till after the close of the year, the ascertained income of 1919-20 was made the basis of this provisional assessment. Then in 1921-22 an adjustment was made; if the actual income of 1920-21 was found to be more than that of 1919-20, a further demand was made, while if it was less, a refund was granted and also in 1921-22 a provisional assessment of the income of 1921-22 on the basis of the known income of 1920-21 was made. In the present case the assessee was entitled under the 2nd proviso to section 68 of the Act of 1922 to the adjustment which was made, but he was also liable to be assessed in 1922-23 on the income of 1921-22 under sections 2 (11), 3 and 22, which together provide for the assessment in any year, of the income of the previous year.

4. The assessee contends (i) that the income of 1921-22 cannot be taxed twice in the absence of an express provision of law to that effect, and (ii) that there was no escape of income within the meaning of section 34 and that at most there was a mistake apparent from the record which under section 35 can only be corrected within one year from the date of demand notice.

(i) As regards the first point, in my opinion there is the necessary express provision of law. As explained in paragraph 3, section 18 of the Income-tax Act of 1918 provides for the provisional assessment in 1921-22 of the income of the year 1921-22; while sections 2 (11), 3 and 22 of the Income-tax Act of 1922 provide for the assessment of income of 1921-22 in the year 1922-23. That this is the effect of the law was recognised by the legislature, as is shown by the enactment of section 25 of the Act of 1922 which provides for an adjustment when a business, profession or vocation is discontinued, to compensate the assessee for the double tax-

tion of the income of 1921-22. It may be mentioned that this fact is also recognized by the commentators, P. D. Aiyangar (The Law of Income-tax, pages 342-343 and 354) and A. V. Viswanatha Sastri (The Law and Practice of Income-tax in British India, page 195, paragraph 349), and this procedure has been followed universally throughout India by the Department and has never been contested. I may perhaps be allowed to add for your Lordships' information that the adjustment system was retained for one year under the 1922 Act at the request of representatives of the commercial community. The year 1921-22 was a bad year and consequently the nett result of its retention was a heavy loss to the revenues as the refunds due on adjustment exceeded the sum recovered on adjustment by $2\frac{3}{4}$ crores of rupees.

(ii) As regards the second contention, in my opinion neither section 34 nor section 35 has any application.

(a) Section 34 deals with the assessment of income which has escaped assessment, but in the present case the income of 1921-22 was computed by the Collector and the assessment completed as is shown by his order of October 31, 1923, and the amount of income-tax and super-tax payable was determined; nothing escaped assessment but the Collector omitted to issue a demand notice under section 29 for the income-tax and super-tax due. This he should have done, of course, allowing credit for the refund to which the assessee was entitled as explained above. As the Income-tax Act of 1922 lays down no period of limitation for the issue of a demand notice under section 29 after the sum payable has been determined, the Income-tax Officer has power even now to make the demand without invoking section 34.

(b) Section 35 deals with the rectification of mistakes apparent from the record. In the present case there was no mistake in the assessment, but only an omission to take the subsequent steps necessary for the recovery of the amount due. Moreover, the fact that the period of limitation within which section 35 must be applied is reckoned from the date of the demand being made, implies that the section can only operate after a demand has been made, while in the present case the demand was omitted.

5. It is submitted that this view of the law is supported by the decision of the Madras High Court dated the 26th September, 1923 in Reference Case No. 4 of 1923, *Commissioner of Income-tax, Madras v. M. S. S. Chidambaram Chettiar and Meyappa Chettiar* (1).

6. I may mention that if the High Court accepts this view, I propose in exercise of my powers of review to cancel the assessment under section 34 and to direct the Income-tax Officer to issue a demand notice for the income-tax and super-tax previously assessed, but not demanded.

K. P. Jayaswal and *S. Saran*, for the assessee.

Sultan Ahmed, The Government Advocate, for the Crown.

JUDGMENT.

DAWSON MILLER C. J.—The only question in this case is whether the assessee can escape payment of income-tax and super-tax assessed at Rs. 3,898 for the financial year 1922-23 on the ground that the demand notice issued to him claiming payment of the tax was not issued during the financial year for which the tax was payable. What happened was that for the previous year (1921-22) he had been assessed for income-tax and super-tax to a sum of over Rs. 18,000. That was under the Act of 1918. Under the provisions then in force the assessment was in all cases a provisional one based on the previous year's income but liable to adjustment when the actual income for the year in question came to be known. It so

happened that the income for that year 1921-22 had been provisionally assessed at a sum very much larger than the actual income turned out. In fact the actual income for 1921-22 produced a tax and super-tax amounting together to only Rs. 3,898. There was therefore a balance due to the assessee on adjustment of over Rs. 14,000. That balance was ascertained after taking into consideration the return made by the assessee of his actual income for the year 1921-22. The return was made for the purpose of ascertaining the income for the next succeeding year, that is to say, the year which began in April, 1922. That year came under the new Act of 1922 by which the provisional adjustments were abandoned and a different method of adjustment was adopted, namely, the income for any financial year was based once and for all upon the actual income of the previous year. Accordingly on the 1st November, 1922 the assessee whose return was accepted was served with a notice intimating that in respect of the income of the previous year he was entitled to a refund of Rs. 14,277. That sum was the surplus which he had paid for the previous year over and above that which, as it turned out, he was liable to pay upon the actual income earned. When that notice was issued it was perfectly clear from the form of it that the income for the year 1922-23 which was based upon exactly the same assessment would also be taxed and super-taxed to the extent of Rs. 3,898 but for some reason or other no actual demand for payment of that sum for 1922-23 was made at that time. This appears to have been discovered sometime before January, 1924 and on the 26th of that month the Income-tax Officer, finding that no income-tax had been paid by the assessee in respect of that year 1922-23, treated the case as one under section 34 of the Income-tax Act, 1922, which provides for cases where no assessment has been made or where certain items of income have not been taken into account in making the previous assessment. The section provides in effect that in such a case where income has escaped assessment or has been assessed at too low a rate for any year the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax a notice containing the requirements which may be included in a notice under subsection (2) of section 22 and may proceed to assess or re-assess such income. If that were the real state of affairs and no assessment had in fact been made for the year 1922-23 then no doubt section 34 would apply and the notice which was issued under that section, on the 26th January, 1924, would be a notice issued within the time prescribed for that purpose under that section. Here again it was obvious to the assessee that he had been assessed for a tax to the amount of Rs. 3,898 for the year in question so that although no demand in the prescribed form for the income-tax for that year was served, there was in fact an intimation to the assessee on two occasions, namely on the 1st November, 1922 and the 26th January, 1924 of what the amount of the income-tax payable by him was.

The Income-tax Commissioner before whom the case came eventually and who stated a case for the High Court, considered that this was not a case to which section 34 applied, that is to say, he did not think it was a case where no assessment had been made for the year in question or where any part of the income, profits or gains had escaped assessment, for an assessment had actually been made. Therefore upon the case stated we must take it that the facts do not disclose a case coming within section 34. Then on the 9th June, 1924 the assessee having taken exception to the demand under section 34 a fresh notice was issued in the ordinary form prescribed under the Act demanding the income-tax for the year 1922-23. It will be seen that this notice was issued something more than a year after the expiration of the year of assessment and the assessee contends that that is too late to make a demand under the provisions of section 29 of the Act. Section 29 of the Act provides that "When the Income-tax Officer has determined a sum to be payable by an assessee under section 23, or when an order has been passed under subsection (2) of section 25 or section 28 for the payment of a penalty, the Income-tax Officer

shall serve on the assessee a notice of demand in the prescribed form specifying the sum so payable." The first thing to be observed is that no period within which such a notice demanding income-tax is to be issued is prescribed in the Act and therefore *prima facie* a notice issued about 14 months after the expiration of the year of assessment would not necessarily be too late. The assessee, however, relies upon the form under which the demand referred to under section 29 is to be made. That form is headed "Notice of demand under section 29 of the Income-tax Act, 1922". It begins thus :—"You have been assessed for the current year to income-tax amounting to Rs." and so on. The learned Counsel for the assessee contends that that form clearly indicates that the demand can only be made during the current year, that is to say, the year in respect of which the income-tax is payable. No doubt in the ordinary course the form prescribed would be quite applicable, because assessments are generally made as soon as possible after the commencement of the financial year and the demand notices are sent out in the ordinary course soon after the assessment is made. I cannot believe, however, that it was intended by prescribing a form of notice of this sort to create a limitation period within which such notice must be given. If it had been the intention of the legislature to prescribe a period of limitation for such notices, I think that such an important provision would have found place in the body of the Act itself indicating that intention. In other sections of the Act we do find that where certain notices have to be given the period within which they have to be given is prescribed. But so far as section 29 is concerned no period at all is prescribed in the Act. Again it is quite possible that in certain cases no demand could be made within the actual year for which the tax is payable. Provision is made for disputes which may arise as to the acceptance or rejection of the assessee's return. If his return is not accepted then an enquiry takes place, evidence may be demanded of him and much time may be expended in carrying on the enquiry and it is quite possible that such enquiry would not terminate until after the year of assessment and I do not think it can be suggested that because the ordinary form prescribed for such a demand contemplates that it will be issued during the current year of assessment, it is tantamount to an enactment that it cannot be issued afterwards. If any part of the form should not be applicable to the particular facts of the case then I presume it can be altered in the ordinary course before the form is sent out, but the mere fact that forms are prescribed under the Act does not seem to me to carry with it the result that unless everything is done exactly as provided by the form it is of no force and effect. Although no time is prescribed for issuing the notice in question I suppose it may be said that such a notice must be issued within a reasonable time. What would be a reasonable time might vary according to circumstances. In the present case it was, as I have already said, about 14 months after the expiry of the year of assessment but from November of the year of assessment the assessee had in fact notice, although no formal demand was made upon him, of the amount for which he had been assessed to income-tax for that year, and again he had notice in the following January showing that a demand was being made upon him for payment of the same sum on the ground that no previous assessment had been made. In these circumstances it seems to me that the notice was issued within a reasonable time. There is no period of limitation in the Act and I do not think in the circumstances the assessee should be allowed to escape payment of that which is justly due from him. I think that in this case the costs should be paid by the assessee who asked for a case to be stated. Having regard to the small amount in dispute we assess the hearing fee at Rs. 150.

MACPHERSON J.—I agree.

[126] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Mr. Justice Chatterjea, Mr. Justice C. C. Ghose and Mr. Justice Cuming.

[25th May and 9th June, 1925.]

Isabella Coal Company

... Assessee*.

v.

The Commissioner of Income-tax, Bengal

... Referring Officer.

Income-tax Act (XI of 1922) Sec. 10 (2) (viii)—Road and Public Works Cess under Cess Acts paid by colliery—If deductible as "local rate," in the computation of its assessable profits—Colliery, if "premises".

Road and Public Works cesses paid under the Cess Acts by a colliery are local rates "in respect of such part of the premises as is used for the purposes of the business" within the meaning of Sec. 10 (2) (viii) of the Income-tax Act and hence can be deducted thereunder in the computation of its assessable profits.

A colliery is a "premises" within the meaning of Sec. 10 (2) (viii).

Raja Jyoti Prasad Singh Deo, In re, 1 I. T. C. 103; and K. M. Selected Coal Co., In re, 1 I. T. C. 281, distinguished.

Case [Reference No. 9 of 1924] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

CASE.

In accordance with the provisions of section 66 (2) of Income-tax Act (XI of 1922), I have the honour to refer for the decision of the Hon'ble High Court the questions of law stated below.

2. The facts of the case are as follows :—When the Isabella Coal Company was assessed in Calcutta to income-tax a claim by the Company to be allowed to deduct the amount paid on account of road and public works cess in computing the profits and gains assessable to income-tax was rejected. The Company appealed to the Assistant Commissioner of Income-tax, Calcutta, claiming among other things that under section 10 (2) (viii) of the Income-tax Act allowance should be made for the amounts paid as road and public works cess as these cesses were "local rates". This claim was rejected by the Assistant Commissioner of Income-tax, Calcutta, on the basis of the decision by the High Court of Patna in the case of *K. M. Selected Coal Company of Manbhum* (1). The Company has now applied for a reference to the High Court on the "point of law—whether road and public works cess is a 'local rate' within the meaning of clause (viii) of section 10 (2) of the Income-tax Act, XI of 1922."

3. The questions of law referred to the Hon'ble High Court for decision are as follows :—

(i) Should an allowance be made to the Isabella Coal Company under section 10 (2) (viii) in respect of the amount paid by it on account of road and public works cess on the ground that these sums were paid on account of "local rates" in respect of premises used for the purposes of the business?

(ii) Should an allowance be made to the Isabella Coal Company under section 10 (2) (ix) in respect of the amount paid by it on account of road and public works cess on the ground that it is an expenditure incurred solely for the purpose of earning such profits and gains?

4. My opinion on the two questions is as follows :—

* (1926) 1. L. R. 53 Cal. 76; 29 C. W. N. 923; A. I. R. (1926) Cal. 396; 89 Ind. Cas. 789.
(1) 1 I. T. C. 281.

(i) Section 10 (2) (viii) of the Income-tax Act provides that in computing profits and gains allowance is to be made for "local rates" or municipal taxes in respect of *such part of the premises* as is used for the purposes of the business. A colliery cannot be said to be "premises"; further, road and public works cesses are payable not in respect of such part of the colliery or premises as is used for the purposes of the business but on the basis of the net annual profits of the property calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up—*vide* section 72, Bengal Act IX of 1880, the Cess Act, 1880. Road and public works cesses cannot therefore come within the purview of section 10 (2) (viii) of the Income-tax Act, 1922. This question was considered by the Patna High Court in *Raja Jyoti Prasad Singh Deo, In re* (1) and it was decided that payments made in respect of road and public works cess should not be deducted in ascertaining the taxable income. This case was not decided entirely under section 9 of the Indian Income-tax of 1918 which corresponds to section 10 of the Indian Income-tax Act of 1922, but the decision of the Calcutta High Court in the case of *Manindra Chandra Nandi v. Secretary of State for India* (2) which was affirmed by the Privy Council [*Manindra Chandra Nandi v. Secretary of State for India* (3)] was referred to as not supporting the claim made under section 9 of Act VII of 1918. On the reasoning used in these cases I would answer this question in the negative.

(ii) This question was also considered by the Patna High Court in the above case, *Raja Jyoti Prasad Singh Deo, In re* (1) and it was decided that the payment of road and public works cess was not an expenditure incurred solely for the purposes of earning such profits and gains. In a later case before the Patna High Court, *In the matter of K. M. Selected Coal Company of Manbhum* (4) the previous decision was referred to with approval and payment of the cesses leviable under the Bihar and Orissa Mining Settlement Act, 1920, and the Bihar and Orissa Jharia Water-supply Act was distinguished from the payment of road and public works cess as the former were tonnage rates imposed on the amount of coal raised and the amount of coal and coke despatched and were not levied after the profits of the business had been ascertained, whereas road and public works cess is a rate imposed upon the ascertained profits of the business. On the reasoning used in these cases I would answer this question also in the negative.

N. N. Sircar, with *U. N. Sen Gupta*, for the assesseees.

S. R. Das, Advocate-General, with *S. M. Bose*, for the Crown.

JUDGMENT.

CHATTERJEA AND C. C. GHOSE JJ.—This is a reference under section 66 (2) of the Income-tax Act, XI of 1922.

The assesseees, the Isabella Coal Company, paid road and public works cess in respect of their coal mine, and claimed a deduction of the amount paid by them as cesses, in the computation of the income-tax under clauses (viii) and (ix) of section 10 (2) of the Income-tax Act, XI of 1922, and the question referred to us is whether the sums paid by them as cesses should be deducted under clauses (viii) and (ix) of section 10 (2) of the Act.

Section 10 (1) lays down that the "tax shall be payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him". (2) "Such profits or gains shall be computed after making the following allowances, namely:—(Omitting the other clauses)—

(1) 1 I. T. C. 103.

(3) (1911) I. L. R. 38 Cal. 372.

(2) (1907) I. L. R. 34 Cal. 257.

(4) 1 I. T. C. 281.

(viii) any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business;

(ix) any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains."

It is not, and cannot be, disputed that road cess and public works cess are "local rates". The question is whether they are local rates "in respect of such part of the premises as is used for the purposes of the business".

The first point therefore is whether a coal mine comes within the expression "premises". The word "premises" is not defined in the Act. It is used with reference to buildings, but it is also used with reference to land, and there is nothing to show that in law the expression is restricted to buildings. We think that the expression is wide enough to cover a coal mine.

The next question is whether the coal mine is "used for the purposes of the business". The assessee is a coal company; they raise and sell coal. It is contended however that so far as the coal taken out in respect of which the cess is levied is concerned, it is not used for the purposes of the business, as "use" does not contemplate the destruction of the thing itself. But having regard to the nature of the property (a coal mine), the cutting and taking away coal is using the premises for the purposes of the business. "In the case of mining properties the only mode in which they may be profitably used is to take from them valuable ores," and the "taking of ore from the mine is rather the use than the destruction of the estate." See *Mahesh Narain v. Nowbat Pathak* (1). Cesses paid by the Company therefore are paid in respect of the premises used for the purposes of the coal business. Section 5 of the Cess Act (Act IX of 1880, B. C.) lays down that all immoveable property (except as otherwise in sections 2 and 8 provided) shall be liable to the payment of a road and a public works cess. Section 6 provides that "the road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immoveable property ascertained respectively as in this Act prescribed." Cesses therefore are payable in respect of all immoveable property, and among others, mines.

The learned Advocate-General however contends that a distinction has been drawn in section 6 of the Cess Act (IX of 1880, B. C.) between land and mines, that in the former, the cess is payable on its annual value, whereas in the case of mines, it is payable on the net profits of the mine, and although if the cess were payable on the mine as land it would be a local rate "in respect of the premises used for the purposes of a business," it is not so as the cess is payable in respect of the *net profits* of a mine. But section 5 lays down that *all immoveable property* (except houses, shops, and other buildings) shall be liable to the payment of a road and public works cess and mine is immoveable property. It is true that section 6 lays down (so far as mines are concerned) that the cesses shall be assessed on the annual *net profits* from mines. But section 6 merely provides the *mode* of assessment, and does not change the nature of the imposition, which is a tax imposed on all immoveable property which includes mines.

It is contended however that the cess is not payable on mine but on such part of it from which coal is taken away, and not even on the coal taken out unless there is a profit, and the cess is payable only on the net profits. But unless the coal is taken out there would be no profits.

Lastly it is contended that as cess is payable on the net profits, it is not payable until the net profits are ascertained, and therefore cannot be deducted. But under section 72 of the Cess Act the net profits of a mine (and quarries, etc.) are

(1) (1905) I. L. R. 32 Cal. 817 at pp. 849 and 852.

to be calculated on the average of the annual net profits for the *last three years* for which accounts have been made up.

The Commissioner of Income-tax relies upon the Case No. 102 of 1920 decided by the Patna High Court [*In the matter of Raja Jyoti Prasad Singi, Deo of Kashipur* (1)] and *In the matter of K. M. Selected Coal Company of Manbhum* (2). In the first case it was held that income derived from the rents and royalties of collieries does not fall within "income derived from business" under section 5 (iv) of the Income-tax Act, 1918, but within "Income derived from other sources" under clause (vi) of that section, and that in assessing income-tax on such income, the amount paid in respect of road cess and public works cess should not be deducted from the taxable income. That case was a reference (under section 51 of the Income-tax Act of 1918) upon the application of the assessee who did not carry on business but who received rents and royalties, and the question was whether road and public works cesses paid by him should be deducted in assessing the tax payable by him.

As stated above, it was held that the income derived from rents and royalties of collieries does not come under the head of income *derived from business*, and therefore did not fall under section 9 of the Act which provided that the tax shall be payable by an assessee under the head "income derived from business" in respect of the profits of any business carried on by him and then set out allowances which might be deducted in computing the profits. Section 11 of the Act which dealt with income derived from "other sources," made an allowance of expenditure "incurred solely for the purpose of making such income or earning such profits". The learned Judges were of opinion that payments made on account of road cess and public works cess cannot be deducted under section 11 in assessing the income-tax. In the view we take of clause (viii) of section 10 (2) of Act XI of 1922, it is unnecessary to consider the above question in the present case.

In the second case, *K. M. Selected Coal Company* (2), it was held that a rate on the annual output of a mine imposed on a colliery proprietor under section 23 (3) of the Behar and Orissa Mining Settlement Act, 1920, by the Local Mines Board of Health, and a cess in respect of the annual despatches of coal and coke from a mine imposed on a colliery proprietor under section 45 of the Jheria Water-supply Act, 1924, by Jheria Water Board do not fall within section 10 (2) (viii) of the Income-tax Act, 1922, but they do fall within clause (ix), and, therefore, should be deducted under the latter clause for the purpose of determining the proprietor's taxable income. The rates payable under these two Acts are no doubt local rates, but not rates imposed on such part of the *premises* as is used for the purposes of business. The rates are imposed on the *owners* of mines,—on the annual output from their mines under one Act, and on the annual despatches of coal and coke from the mine under the other. The Court there had not to consider the rates imposed by the Cess Act, under which cess is imposed upon all immoveable property. So far as clause (viii) of section 10 (2) was concerned all that was necessary to decide was that the word "premises" does not include the annual output or the annual despatches of coal from the mines, upon which alone the rates were payable under the two Acts mentioned above. Road cess and public works cess on the other hand are taxes not against a person but against the property itself. In *Swarnamoyi Debi v. Kumar Paresh Narain Roy* (3) the learned Judges observed that it is a tax upon immoveable property and is assessed upon the annual value of that property. They were not considering mines, in which case the mode of assessment is differently laid down. In *Manindra Chandra Nandy v. Secretary of State for India* (4), the Judicial Committee observed that

(1) 1 I. T. C. 103.

(2) 1 I. T. C. 281.

(3) (1878) I. L. R. 4 Cal. 576 at p. 508.

(4) (1911) I. L. R. 38 Cal. 372 at p. 376.

"both in sections 6 and 72 (of Cess Act, IX of 1880) 'the net annual profits' have reference to the property and not to the individual."

We are accordingly of opinion that cesses paid by the Company are local rates "in respect of such part of the premises as is used for the purposes of the business" within the meaning of clause (viii) of section 10 (2) of the Income-tax Act and that they are entitled to deduction of the amount of the cesses paid.

In this view it is unnecessary to consider whether the payment comes under clause (ix) of section 10 (2) of the Act.

The petitioner Company is entitled to the costs of this reference which is assessed at Rs. 350 including Counsel's fee.

CUMING J.—This is a reference by the Commissioner of Income-tax.

The facts are these : A certain coal company, The Isabella Coal Company, has been assessed to income-tax.

The Company contended that they were entitled to deduct first the amount they have paid on account of road and public works cess in computing the amount assessable to income-tax. They contend that their case falls under either section 10 (2) (viii) or section 10 (2) (ix).

This claim has been rejected by the Commissioner of Income-tax and on the application of the company this reference has been made to the Court. The case turns on the construction of these two sections of the Income-tax Act, Section 10 (2) (viii) and (ix).

Section 10 (2) (viii) runs as follows:—

"Any sums paid on account of land-revenue, local rates or municipal taxes in respect of such part of the premises as is used for the purposes of the business."

It is conceded that road cess and public works cess are local rates.

Mr. Sircar contends on behalf of the company that the tax is leviable on the mine and not on the income, (Section 5 Cess Act), that it is calculated on the income no doubt but this is merely the method of assessment, that the only way of using the mine is by extracting the coal, that a mine is a premises and so the whole of the mine is used for the purpose of the business. Hence the present case comes under section 10 (2) (viii).

The learned Advocate-General would seem to contend that a mine is not a premises, that the assessment is made really on a business, the business being that of cutting coal and that the cess is really paid on account of the business. The cutting of coal is the destruction and not the use of the premises.

The cess is paid on the profit and hence on the business.

I think the Company must succeed. I hold that a mine is a premises.

The expression premises has never as far as I know been legally defined. It has been in one case held to mean a 100 acres park. Popularly no doubt "premises" usually means a building. Legally I do not think it does. We often hear the expression "house and premises" which clearly shows that the premises are not the house only. I am of opinion that a colliery is a premises.

Then the whole colliery is used for the purpose of the business. The colliery is used by digging the coal out of the seams, bringing it to the surface and selling it.

The learned Advocate-General would contend that this is destroying the colliery, not using it.

As Mukerji J., points out in *Mahesh Narain v. Nowbat Pathak* (1), the taking of ore from a mine is rather the use than the destruction of the estate, the partial exhaustion being but the incidental consequence of the use.

(1) (1905) 1. L. R. 32 Cal. 837 at 852.

As far as I am aware there is no other way of using a colliery or mine except by digging the coal or minerals out of it.

The learned Advocate-General would contend that in the case of a mine it is really a cess levied on a business, because the road cess and public works cess is assessed on the annual net profit. This argument confuses the thing, if I may say so, which is liable to pay the tax and the method of arriving at the amount to be paid in any case.

Section 5 of the Cess Act states that all immoveable property... shall be liable to the payment of a road cess and public works cess. A business cannot be said to be immoveable property.

Section 6 on which the learned Advocate-General has relied merely prescribes the method for determining the amount of cess to be paid, in the case of land, on the annual value and in the case of mines, on the annual profit. No doubt the extraction and selling of coal is a business but road cess and public works cess is assessable not on the business but on the immoveable property owned by the person or persons carrying on the business. It is the property that is liable, not the person (See section 5).

I am therefore of opinion that a colliery is a premises, that it is used for the purpose of the business, which business is the extraction and sale of coal and that the road cess and public works cess is a local rate.

That being so, the Isabella Coal Company are entitled to deduct the amount paid as road and public works cess in computing their gains and profits assessable to income-tax.

In this view of the case it is not necessary to consider whether the case falls under section 10 (2) (ix) of the Income-tax Act.

[127] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Macpherson.

[11th June, 1925.]

Ambika Prasad Singh

...

*Assessee**

v.

Commissioner of Income-tax, Bihar and Orissa ...

Referring Officer.

Income-tax Act (XI of 1922), Sec. 14 (1)—Exemption in respect of joint family income, extent of.

Section 14 (1) of the Income-tax Act exempts from taxation in the hands of an individual only that income which has already been taxed in the hands of the joint family as such. Where the assessee receives an annual allowance from his son out of property inherited by the son from his maternal grand-father, such income is not exempted under the provisions of Sec. 14 (1), as it is income received *aliunde* from property not taxed as that of a joint family.

Case [Miscellaneous Judicial Case No. 147 of 1924] stated under section 66 (1) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

The question for the determination of the High Court is whether, when a man receives an annual allowance from his son out of a property which the son inherited from his maternal grand-father, this sum is exempt under the provisions of sub-section (1) of section 14 of the Indian Income-tax Act, 1922.

2. The facts are as follows:—

3. The assessee, Babu Ambika Prasad Singh, is the father of the Maharaja of Tikari, proprietor of the nine annas Tikari Raj. The assessee has no share

* (1926) I. L. R. 5 Pat. 20; A. I. R. (1926) Pat. 256.

in the property which constitutes the Raj, though he has other property. The Maharaja has, for some years, made him an annual allowance in cash which according to the assessee has now been stopped; but the assessee admits payment of Rs. 23,528 during the year 1922-23 which was assessed to income-tax in the year 1923-24.

4. In my opinion this sum was not received by the assessee in his capacity as a member of a Hindu undivided family. Section 14 appears to me to mean that where a member of a Hindu undivided family has a separate income of his own, that income alone will be taxed and not also any further income which may be distributed to him from the joint property of the undivided family. Even admitting that the assessee and the Maharaja form a Hindu undivided family, the payment made to the assessee out of property which is not joint between him and his son, is not a sum which he receives as a member of a Hindu undivided family and it therefore appears to me that the sum is assessable.

K. P. Jayaswal and N. P. Prasad, for the assessee.

Sultan Ahmed, Government Advocate, for the Crown.

JUDGMENT.

DAWSON MILLER C. J.—This is a case stated for the opinion of the Court by the Income-tax Commissioner under section 66 sub-section (1) of the Income-tax Act, 1922.

The assessee Ambika Prasad Singh is the father of the present proprietor of the nine annas Tikari Raj. The assessee has no interest in that property but his son the proprietor has been in the habit of making him an allowance yearly out of the proceeds of the property of the Tikari Raj. Upon that the assessee has been assessed to income-tax and the question which is submitted for our opinion in this case is formulated by the Income-tax Commissioner thus:—"The question for the determination of the High Court is whether, when a man receives an annual allowance from his son out of a property which the son inherited from his maternal grandfather, this sum is exempt under the provisions of sub-section (1) of section 14 of the Indian Income-tax Act, 1922."

Section 14, sub-section (1) provides as follows:—

"The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family."

The learned Commissioner was of opinion that as the assessee received this sum as an allowance from his son and not by reason of any right to share in the proceeds of the Tikari Raj, that property not being the property of an undivided Hindu family, he did not come under the provisions of section 14 sub-section (1). His view of that section is that it only applies to cases where the assessee receives the income in the capacity of a member of a Hindu undivided family. If he receives it as a mere gratuitous allowance to which he is not in law entitled by reason of his being a member of a joint family then he does not come under the provisions of section 14. That is the only question which has been submitted for our opinion.

It is contended by Mr. Jayaswal on behalf of the assessee that if he is joint with his son for any purpose,—and he contends that in the present case he is joint for some purposes,—then anything which he may receive from his son is received by him as a member of a Hindu undivided family. I cannot think that the section bears any such interpretation. The whole object of the section is to exempt from taxation in the hands of an individual that which has already been taxed in the hands of the joint family as such. If, however, the individual receives an income *aliunde* from property which has not been taxed as that of a Hindu joint

family, then it would appear that the provisions of section 14 have no application whatever. In my opinion the learned Commissioner took a correct view of the section and the question propounded for our opinion must on the facts stated be answered in the negative.

MACPHERSON J.—I agree.

[128] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Macpherson.

[15th June, 1925.]

Raghunath Mahadeo

v.

... Assessee*

Commissioner of Income-tax, Behar and Orissa

Income-tax Act (XI of 1922), Secs. 23 (3) and (4), 30 and 66—Notice to assessee under Sec. 23 (2)—Production of accounts by assessee—Accounts rejected as not balanced—Appeal against assessment under Sec. 30—If maintainable—Commissioner refusing to state a case—Duty of Income-tax Officer.

The assessee, in compliance with a notice under Sec. 23 (2) issued by the Income-tax Officer who was not satisfied with his return, attended in person and produced his books of account before the Officer who rejecting the accounts as not balanced, made an assessment, apparently acting under sec. 13 proviso. Against this assessment the assessee preferred an appeal to the Assistant Commissioner which was dismissed and subsequently an application to have a case stated was refused by the Commissioner on the ground that the assessment being really one under Sec. 23 (4) and not under Sec. 23 (3) was not appealable and hence not within the terms of Sec. 66 (2). On an application to the High Court under Sec. 66 (3),

Held, that the assessment was one under Sec. 23 (3) and not under Sec. 23 (4) and that the Commissioner must state a case stating precisely the facts with reference to the evidence before the Income-tax Officer and the effect of the account books.

The Income-tax Officer cannot shirk his duty to ascertain the profits by merely stating that the accounts are not balanced, if the result of that balance can be ascertained by taking small amount of trouble.

The mere fact that the Income-tax Officer did not accept the evidence produced by the assessee in support of his return cannot bring the case within the provisions of Sec. 23 (4).

Application [Miscellaneous Judicial Case No. 56 of 1925] under section 66 (3) of the Income-tax Act, XI of 1922, for an order directing the Commissioner of Income-tax, Behar and Orissa, to state a case for the decision of the High Court.

K. P. Jayaswal, for the assessee.

JUDGMENT.

DAWSON MILLER C. J.—In this case it seems to me that the Commissioner of Income-tax took a wrong view of the law. He treated the case as one in which no appeal lay under section 30 of the Income-tax Act, 1922, and therefore decided that the assessee was not entitled to ask him to state a case under the provisions of section 66. What happened shortly was this. The assessee carries on a business in cloth, gold, silver, jute and groceries at Kishungunj and other places. With regard to his income at the other places we are not concerned and no question arises. With regard to his income from his business in groceries in Kishungunj, it is no longer contended that the assessee can seek any further relief under section 66. But with regard to the cloth, gold, silver and jute businesses at Kishungunj, it is contended that the accounts were produced and that under section 13 the Income-tax Officer ought to have assessed the income in accordance with the regular method of

* (1925) 6 Pat. L. T. 555; A. I. R. (1925) Pat. 694; 89 Ind. Cas. 675.

accounting as shown by the assessee's books. What happened was that the assessee was called upon by the Income-tax Officer under section 23 sub-section (2) to attend at the Income-tax Officer's office and produce any evidence on which he might rely in support of his return. The return I may mention had not been accepted by the Income-tax Officer and, therefore, he wished the personal attendance of the assessee and the production of his books if he relied upon them. The assessee did attend and he produced his books relating to these four classes of business which I have just referred to. The Income-tax Officer said that these books had not been balanced and therefore he could get no reliable information from them. He accordingly proceeded to assess the profits apparently adopting the powers conferred by the proviso to section 13 of the Act.

From that decision the assessee appealed to the Assistant Commissioner. His contention was, as it is to-day, that the books produced by him although not balanced in the sense of the expenditure having been deducted from the profits, did show exactly what the expenditure was and what the gross income was, and that the only thing which remained to be done was to deduct the aggregate of the expenditure from the aggregate of the gross profits and then you would get the net profits which is the taxable income. That is merely a simple question of subtraction and because this had not been done he complains that the Income-tax Officer refused to regard his books as showing what the actual profits were. The Assistant Commissioner upheld the decision of the Income-tax Officer.

The assessee then applied under section 66 sub-section (2) of the Act asking the Commissioner to state a case. The Commissioner took the view that the assessment had been made not under section 23 (3), but under section 23 (4) and consequently there was no appeal permissible from the Income-tax Officer and although the Assistant Commissioner had in fact heard and determined such an appeal still he considered that the Assistant Commissioner had no jurisdiction to do so and, therefore, he must treat the case as one in which no appeal was permissible and as if no appeal had been preferred. If that were so, it would follow that no application under section 66 sub-section (2) could succeed.

The first question we have to determine in the present application is whether the Income-tax Commissioner was right in arriving at the conclusion that the income in the present case was assessed under section 23 (4), or whether it was not in fact assessed under section 23 (3). Section 23 provides in the first clause that if the Income-tax Officer is satisfied that a return made under section 22 is correct and complete, he shall assess the total income of the assessee, and shall determine the sum payable by him on the basis of such return. Then by clause (2) it is provided that if the Income-tax Officer has reason to believe that a return made under section 22 is incorrect or incomplete, he shall serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's office or to produce, or to cause to be there produced, any evidence on which such person may rely in support of the return. The assessee did attend and he did produce the evidence upon which he relied in support of his return but that evidence, as I have said, was not treated by the Income-tax Officer as conclusive of the matters which he had to determine. Nevertheless the assessee did attend at the office and he did produce the evidence upon which he relied. In other words, he complied with the notice issued under section 23 sub-section (2). The learned Commissioner seems to have thought that because the books were not relied upon by the Income-tax Officer, therefore, the assessee had not complied with the notice served upon him under section 23 (2). I cannot, however, take this view. Sub-section (3) of the same section provides that on the day specified in the notice issued under sub-section (2), the Income-tax Officer, after hearing such evidence as such person may produce and such other evidence as the Income-tax Officer may require on specified points (and there is nothing in this case to show that

he required any further evidence) shall, by an order in writing, assess the total income of the assessee, and determine the sum payable by him on the basis of such assessment. It seems to me that the assessment in the present case was carried out under that sub-section. He saw the witness, he considered the evidence produced by him and upon which he relied, and he thereupon made his assessment and in fact when the assessment was made and the demand sent to the assessee for payment of the amount assessed, it was stated therein that it was made under section 23, sub-section (3) and that he might appeal to the Assistant Commissioner if he wished within 30 days. So there can be no doubt whatever that the opinion of the Income-tax Officer was that he was acting under sub-section (3) of the section.

The fourth sub-section and the one under which the Commissioner considered that the assessment in this case had been made provides in effect as follows:— That if the assessee fails to make a return or fails to comply with all the terms of the notice issued under sub-section (4) of section 22 or, having made a return fails to comply with all the terms of a notice issued under sub-section (2) of section 23, the Income-tax Officer shall make the assessment to the best of his judgment. The Commissioner seems to imagine that the assessee in this case had failed to comply with the terms of the notice issued under the sub-section. In my opinion he did nothing of the sort. All that the notice required and could require was that the assessee should attend at the Income-tax Officer's office and should produce such evidence as he himself (the assessee) relied upon in support of his case. That he did, and the mere fact that the Income-tax Officer did not accept that evidence as conclusive of the matter does not appear to me to bring the case within the provisions of section 23 sub-section (4). The reason, therefore, given by the Commissioner for refusing to state a case, in my opinion, cannot stand.

The next question we must consider is whether there is any substance in the present application that the Commissioner should be ordered to state a case. The facts as set out in the petition and as stated by Mr. Jayaswal on behalf of the assessee are that the accounts produced in support of the cloth, gold, silver and jute businesses, although not balanced or not closed in the sense I have already referred to, undoubtedly show by taking very slight trouble and carrying out a very simple sum in arithmetic what the actual profits made for the year in question were. If that is so it seems to me quite clear that the Income-tax Officer was negligent in his duty in failing to carry out that simple matter himself and so ascertain what was the effect of the books. He cannot shirk his duty by merely stating that the account is not balanced if the result of that balance can be ascertained by taking small amount of trouble. The books were there but he apparently refused to accept them merely upon that ground. In my opinion he was not entitled to act in that way. The question seems to me to be one of importance but before we can actually decide the question we must ask the Commissioner to state a case detailing what the actual facts are. It may be that when the books are examined, the case, as I have stated it, is put a little too broadly but one cannot at the present moment say because we have not got the books before us. The Commissioner will draw up a case stating precisely what the facts are with regard to the evidence before the Income-tax Officer, what the effect of the books is and then having done that the forwarded the case to the Court we will decide what is the law applicable to such circumstances. The assessee, I understand, has now got the custody of the books which were relied upon before the Income-tax Officer. These books will have to be returned to the Income-tax Commissioner to enable him by personal inspection thereof to ascertain what the actual facts are.

MACPHERSON J.—I agree.

[129] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Harrison and Mr. Justice Campbell.

[17th February, 1925.]

Banji Lal

...

Assessee.*

v.

Chief Commissioner, Delhi

..

Referring Officer.

Income-tax Act (XI of 1922), Sec. 66 (2)—Application for reference—Application to Commissioner after one month from date of order complained—Jurisdiction of Commissioner to make a reference.

Where on an application by an assessee under Sec. 66 (2) of the Income-tax Act presented to the Commissioner more than a month after the passing of the order giving rise to the application, a reference was made by the Commissioner,

Held, that the delay in presentation took away the jurisdiction of the Commissioner and consequently the reference was not competent.

Case [Civil Reference No. 25 of 1924] referred under section 66 (2) of the Income-tax Act (XI of 1922) by the Chief Commissioner, Delhi, with his letter No. 5202, dated 11th September, 1924, for the orders of the High Court.

Moti Sagar, for the assessee.

Dalip Singh, Government Advocate, for the Referring Officer.

JUDGMENT.

HARRISON J.—This is a reference, under section 66 (2) of the Income-tax Act of 1922, made by the Chief Commissioner of Delhi to this Court.

Mr. Dalip Singh takes a preliminary objection that the reference is not competent in as much as the application upon which it is based was presented more than a month after the order had been passed which gave rise to that application, the actual dates being the 11th of July and the 25th of August, 1924, respectively. In addition to several other points the question of whether this bars the reference has also been referred by the Chief Commissioner, though he says he does not wish to press it unless it is in itself fatal.

It is clear in our opinion that the delay in presenting the application robs the Chief Commissioner of all jurisdiction, and therefore the reference made by him under section 66 (2) was not competent. This view has been taken by a Division Bench of this Court in Civil Mis. No. 497 of 1923†, and there is ample authority of the English Courts to the same effect. The Indian Income-tax Act reproduces the law of England on this point, and we find that the preliminary objection is fatal to the determination of the reference on its merits, and we, therefore, answer the reference accordingly.

The costs of the respondent will be paid by the petitioner.

* (1925) I. L. R. 6 Lah. 373; 26 P. L. R. 796; A. I. R. (1925) Lah. 615 (1); 90 Ind. Cas. 1018.

† The order of *Abdul Raoof and Harrison, JJ.*, dated 12th March 1924, in Civil Mis. No. 497 of 1923:—

This is an application which purports to be made under Sec. 66 (3) of the Income-tax Act in consequence of an alleged refusal by the Income-tax Commissioner to refer a question of law to this Court. Whether or not there was such a refusal, the application itself under Sec. 66 (2) was made two months after the order of the Assistant Commissioner, dated 12th December 1923, under Sec. 31 of the Income-tax Act. It was therefore clearly barred, as is the further remedy under Sec. 66 (3) of the Income-tax Act.

We dismiss the application with costs.

[130] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Sydney Robinson, Kt., Chief Justice and Mr. Justice Godfrey.

[26th November, 1924.]

C. A. M. K. Kasi Chettyar

...

Assessee.

v.

The Commissioner of Income-tax, Burma

Income-tax Act (XI of 1922), Secs. 30 (2) and 66 (3)—Appeal to Asst. Commissioner beyond thirty days—Refusal to excuse delay—Exercise of discretion by Asst. Commissioner, if question of law—Commissioner refusing to state a case thereon—Application to High Court.

Where the Assistant Commissioner of Income-tax rejected an appeal presented after the period of thirty days prescribed by Sec. 30 (2) of the Act, as he was not satisfied that the reasons put forward by the assessee for condoning the delay amounted to sufficient cause therefor and thereupon the assessee applied to the Commissioner to state a case which was refused:

Held, that the exercise of the discretion by the Asst. Commissioner in refusing to condone the delay would not amount to a question of law in respect of which the Commissioner could be required by the Court to state a case under Sec. 66 (3) of the Income-tax Act.

Civil Miscellaneous Application No. 74 of 1924 under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Burma, to state a case for the opinion of the High Court.

Barnabas, for the assessee.*Higinbotham*, for the Crown.

JUDGMENT.

This is a petition asking the Court to require the Commissioner of Income-tax to state a case and to refer it to this Court.

Proceedings had been taken in the matter of the income-tax to which the petitioner is liable, both in respect of his income for the years 1921-22, the adjustment of income-tax due for the year 1920-21, and in respect of super-tax for those two years.

The proceedings were initiated by the issue of a notice of demand, which was served on the petitioner on the 17th of January, 1924.

The Act allows an appeal within thirty days to the Assistant Commissioner. An appeal was filed, but not until the 31st of March, 1924. The Assistant Commissioner held that the appeal was—and it is now admitted before us that it was—time-barred. He further considered the reasons put forward for his condoning the delay, and he came to the conclusion that they amounted to no sufficient cause, and the appeal was then rejected. Thereafter, the petitioner applied to the Commissioner of Income-tax to state the case and refer it to this Court.

It will be seen from the provisions of section 66 of the Indian Income-tax Act that the application to the Commissioner to state the case must be concerned with a question of law arising out of the appellate order.

The only question before us, therefore, is whether there is any question of law which would justify us in directing the Commissioner to state the case.

The Commissioner has very properly pointed out that the only question that arises out of the Assistant Commissioner's order is whether he was justified or not in refusing to condone the delay in presenting the appeal.

We agree with the learned Commissioner that this is entirely a question of fact. It was in the discretion of the Appellate Court, and there was nothing in the exercise of that discretion which can amount to a point of law.

There is, therefore, no question of law arising out of the order of the Commissioner to justify action by us. The Commissioner has already indicated that, but

for the application to state the case, he would have been prepared to consider the question under section 33 of the Act. He did not do so because of the pendency of the present application, and the likelihood of its being presented to this Court.

We may further point out that the questions of law that it is sought to press upon us are questions arising during the course of the proceedings prior to assessment; that none of these questions were raised on appeal; and that only four out of twelve were raised before the Commissioner.

We must, therefore, refuse to grant the mandamus prayed for, and the application will stand dismissed with costs, advocate's fees five gold mohurs.

[131] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Mr. Justice Walmsley, Mr. Justice Greaves, Mr. Justice C. C. Ghose,
Mr. Justice B. B. Ghose, and Mr. Justice Mukerji.

[29th June and 22nd July, 1925]

Nawabzadi Mehar Bano Khanum and others . . .

Assessees.*

v.

The Commissioner of Income-tax, Bengal . . .

Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (1) (a) and 4 (3) (viii)—Salami or mutation nazar—If agricultural income—If exempt from assessment to income-tax.

Held by the Full Bench (Walmsley, J. dissentiente):—Salami or nazar paid by a tenant to a landlord for the recognition of a non-transferable holding is rent or revenue within the meaning of Sec. 2 (1) (a) of the Income-tax Act, and, as such, is exempt from income-tax as agricultural income, by virtue of Sec. 4 (3) (viii) of the Act.

Rarendra Kishor Manikya v. Secretary of State for India, 1 I. T. C. 67; 48 Cal. 766; overruled.

Reference [Full Bench Reference No. 1 of 1925] in case [Reference No. 5 of 1924] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

This was a reference to the Full Bench made by Greaves and Mukerji, JJ., on 27th January, 1925 upon a reference which had been made by the Commissioner of Income-tax, Bengal (Mr. W. D. R. Prentice), dated the 6th June, 1924, under section 66 (2) of the Indian Income-tax Act (XI of 1922) for the opinion of the High Court on the following questions raised by the applicants in connection with assessment of their income derived from *salami* or *mutation nazar*:—

(1) Whether *mutation nazar*, that is, the amount paid to a landlord for recognising the transfer of a holding by one tenant to another is agricultural income within the meaning of section 2, sub-section (1) (a) of the Indian Income-tax Act, XI of 1922;

(11) and as such, is exempt from assessment to income-tax under section 4, sub-section (3) (viii) of the said Act.

The facts of the case are fully set out in the Order of Reference.

ORDER OF REFERENCE.

GREAVES J.—This is a reference under section 66 (2) of the Income-tax Act, XI of 1922, made to us by the Commissioner of Income-tax. The point

*(1926) I. L. R. 53 Cal. 34; 29 C. W. N. 969; 42 C. L. J. 151; A. I. R. (1925) Cal. 929; 85 Ind. Cas. 997.

which arises is a very short one, namely, whether mutation *nazar*, that is, the amount paid to a landlord for recognising the transfer of a holding by one tenant to another, is agricultural income within the meaning of section 2, sub-section (1) (a) of the Indian Income-tax Act, XI of 1922, and as such is exempt from assessment to income-tax under section 4, sub-section (3) (viii) of the said Act. The Income-tax Officer held that such payments were assessable to income-tax having regard to the decision of this Court in the case of *Birendra Kishor Manikya v. Secretary of State for India* (1). An appeal was preferred by the assessee against the assessment of the Income-tax Officer. The Assistant Commissioner of the Dacca Range rejected the appeal agreeing with the decision of the Income-tax Officer. Accordingly, an application was made to the Commissioner of Income-tax asking for a reference to this Court under the provisions of the section of the Act to which I have referred and the Commissioner has, accordingly, referred the question in the terms which I have indicated. He agrees with the Income-tax Officer that the assessment was rightly made and that the *nazar* is not agricultural income and is, therefore, not exempt from income-tax and he adopts as the grounds of his decision the reasoning of this Court in the case of *Birendra Kishor Manikya v. Secretary of State for India* (1), to which I have just referred. The case of *Birendra Kishor Manikya v. Secretary of State for India* (1) was decided under the Income-tax Act of 1918, but it is conceded that so far as the question now before us is concerned, that Act was identical with the present Act of 1922. The point, therefore, is covered by the decision in *Birendra Kishor Manikya v. Secretary of State for India* (1), provided we agree with that decision. Before I refer to it, I must refer shortly to the sections of the Income-tax Act of 1922 which bear upon the point. Section 4, sub-section (3) provides that the Act is not to apply to certain classes of income. Amongst these, is agricultural income and in section 2 of the Act, agricultural income is defined as rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such. The land in respect of which the *nazar* was paid was a part of a permanent settled estate, which is also subject to road-cess.

Two points arose for decision in the reference to which the case of *Birendra Kishor Manikya v. Secretary of State for India* (1) relates. The first point was whether the *pazar* or *salami* payable in respect of a tenancy of waste land was assessable to income-tax or exempt as being rent or revenue derived from land used for agricultural purposes within section 2, sub-section (1) (a) of that Act. The second question was the one which directly arises on the present reference, namely, whether the *nazar* or *salami* paid for the recognition of the transfer of a holding from one tenant to another was rent or revenue derived from land which was used for agricultural purposes within the meaning of section 2, sub-section (1) (a) of the Income-tax Act. The learned Judges who heard the reference decided that *nazar* or *salami* paid in respect of waste land was revenue within the meaning of section 2, sub-section (1) (a). The reason for their so holding was that they thought that the amount fixed for periodical payment, that is, rent, was not independent of the *nazar* or *salami*, and that the *nazar* or *salami* was a capitalised sum which taken with the periodical rent constitute in the aggregate the consideration for the grant. When, however, they came to consider the question of *nazar* or *salami* paid for recognition of the transfer, they held that this was not revenue within the meaning of section 2 (1) (a), because it was not a return, yield or profit of any land and further that it was not rent in any sense of the term, but they held that such a payment was a payment to purchase peace in order that the landlord might not contest the validity of the transfer and they held that this was not agricultural income. With all respect to their Lordships who decided that case, I feel some difficulty in accepting

the reasoning upon which it is founded. The expression "revenue," as they say in their judgment, includes return, yield or profit of any land and I find it very difficult to escape from the conclusion that a payment of this kind is not profit derived from the ownership of the land. If, therefore, revenue includes profit, as I think it does, then it seems to me that *nazar* or *salami* is really derived from land which is used for agricultural purposes within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income-tax Act of 1922.

The result is that, in my opinion, the assessee is exempt from payment of income-tax by reason of the provisions of section 4, sub-section (3) (viii) of the same Act. The question, therefore, which we refer for the decision of a Full Bench is whether the decision in *Birendra Kishor Manikya v. Secretary of State for India* (1), as regards *salami* paid for the recognition of a transfer of a holding from one tenant to another is correct and the question which arises for the decision of the Full Bench is whether *nazar* or *salami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income-tax Act, XI of 1922. If the Full Bench hold that such *nazar* or *salami* is not assessable to income-tax, this judgment will be forwarded to the Commissioner. If, however, the Full Bench hold that the case of *Birendra Kishor Manikya v. Secretary of State for India* (1) was rightly decided, the matter will come back to this Bench in order that we may deal with the other question which was raised before us by the assessee namely, that having regard to the provisions of the permanent settlement no liability for assessment has been imposed by the Income-tax Act on *nazar* or *salami*.

MUKERJI J.—I agree.

Babu Jogendranath Mukerjee (with *Babu Paresh Nath Mukerjee*) argued on behalf of the applicants that *nazar* was a part of rent derived from land. Admitting that it is no part of rent, it is a payment by one who had derived his title from the tenant which was in reference to land and not independent of land. Revenue is defined in Murray's Oxford Dictionary, Vol. VIII (Ed. 1910), p. 597, as a return from property or collective items or amount which constitute an income from possession of land. Therefore *nazar*, if it is not rent, is at least part of revenue as mentioned in the Income-tax Act, and whether it is derived from settlement of waste land or from mutation, is part of a profit derived from land. Such income is within the meaning of agricultural income as defined in section 2 (1) (a) of the Act and therefore exempt from income-tax.

The Standing Counsel (*B. L. Mitter*) with *Babu Surendra Nath Guha*, Senior Government Pleader, and *Nuruddin Ahmed*, Junior-Government Pleader, contended on behalf of the Crown that *nazar*, whether it is rent or revenue, does not touch the question; it must be derived from land, it must flow from land. Mutation *nazar* does not directly arise from land, it arises out of a particular transaction. It is not rent because the incidents of the tenancy continued as before. *Nazar* is not incident of the tenancy. Referring to section 18 (6) of the Bengal Tenancy Act, it is a landlord's fee levied and paid when one tenant transferred a non-transferable holding to another. That money flowed from the transaction which intervened between the old and the new tenancy. It has been held in *Birendra Kishore Manikya v. Secretary of State for India* (1), that *abwabs* or illegal impositions are assessable to income-tax. In *Partridge v. Mallandaine* (2), it was held that profits derived from betting were assessable. Therefore, impositions whether illegal or statutory were assessable. The question is, whether it was derived from land. Section 12 of the Bengal Tenancy Act provided for payment of a landlord's fee when a transfer of permanent

(1) 1 I. T. C. 67; 48 Cal. 766.

(2) (1886) 18 Q. B. D. 276; 2 Tax Cas. 179.

tenure was sought to be registered. In order that the transfer be a valid one, the fee must be paid; it is an incident of the transfer and not an incident of the tenancy. *Nazar* is similarly paid for recognition of the transfer. It might be revenue but not derived from land.

JUDGMENT.

WALMSLEY J.—This reference raises the question of the liability of mutation *nazarana* to income-tax.

The referring Judges are unable to agree with the view taken in the case of *Birendra Kishor Manikya v. Secretary of State for India* (1). In that case it was held that the premium paid for the settlement of waste land or abandoned holdings is not liable, but that the premium paid for recognition of a transfer of a non-transferable occupancy holding from one tenant to another is liable.

I was one of the three Judges who delivered that decision and I find that I am in a minority on this Bench. In the absence of any fresh arguments it is enough for me to say that I adhere to the opinion expressed in that judgment for the reasons there given.

GREAVES J.—The question which arises for the decision of the Full Bench is, whether *nazar* or *salami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income-tax Act, XI of 1922. This question arose for the decision of the Court in the case of *Birendra Kishor Manikya v. Secretary of State for India* (1) and it was there decided that such payments were assessable to income-tax. Doubts having been raised as to the correctness of that decision the matter has been referred to the Full Bench. Agricultural income is not assessable to income-tax under the Income-tax Act, in which Act such income is defined as rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of Government as such and the land in the present case in respect of which *nazar* was paid was a part of a permanently settled estate which is subject to road cess. It is admitted by the learned Standing Counsel who appeared for the Secretary of State that *nazar* is revenue, but he argues that although it is revenue it is not revenue derived from land but from the transaction, that is, from the recognition of the transfer and that it is an incident of the transfer and not of the tenancy and therefore does not flow from the land.

In the case of *Birendra Kishor Manikya v. Secretary of State for India* (1), the learned Judge who delivered the judgment of the Court referred to the definition of revenue in the Oxford Dictionary as "the return, yield, or profit of any land, property or other important source of income; that which comes into one as a return from property or possessions, specially of an extensive kind; income from any source specially when large and not directly earned."

The conclusion seems to me irresistible that if it is admitted, as I think it is rightly admitted, that *nazar* is revenue, it is profit of the land and that it flows therefrom or from the ownership thereof but in *Birendra Kishor Manikya v. Secretary of State for India* (1), it is said that this is not so and that it cannot be deemed the return, yield, or profit of any land, but that it is money paid by the transferee to the landlord to purchase peace, so that he may not contest the validity of the transfer.

This no doubt is true, but it seems to me to ignore another aspect altogether, namely, that it is money which comes to the landlord by virtue of the fact that he

is the owner of the land. Viewed in this light it clearly is derived from the land and is agricultural income within the definition thereof contained in the Income-tax Act and as such exempt from assessment to income-tax under that Act.

I would therefore answer the question referred to the Full Bench by saying that *nazar* or *salami* paid by a tenant to a landlord for the recognition of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income-tax Act, XI of 1922 and that it is exempt from assessment to income-tax by virtue of the provisions of section 4 (3) (viii) of the same Act.

It follows that in my view the decision in *Birendra Kishor Manikya v. Secretary of State for India* (1) in so far as it holds to the contrary is not correct.

This judgment will be forwarded to the Commissioner of Income-tax.

C. C. GHOSE, J.—I agree with my learned brother, Mr. Justice Greaves, in the view which he has taken.

B. B. GHOSE, J.—I agree in the opinion expressed by my learned brother, Mr. Justice Greaves.

MUKERJI, J.—I also agree in the judgment delivered by my learned brother, Mr. Justice Greaves.

[132] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Mr. Justice Rutledge and Mr. Justice Brown.

[4th August, 1925.]

Leong Moh and Company

...

Assessee.

v.

The Commissioner of Income-tax, Burma

Income-tax Act (XI of 1922), Sec. 66 (2) and (3)—No application to Commissioner for stating a case—Application to Court, if lies—Jurisdiction.

Where the assessee did not apply to the Commissioner of Income-tax under Sec. 66 (2) of the Act, asking him to state a case, the High Court has no jurisdiction in respect of any application by him under Sec. 66 (3) of the Act.

Civil Miscellaneous Application No. 67 of 1925 under section 66 (3) of the Income-tax Act (XI of 1922), for an order directing the Commissioner of Income-tax, Burma, to state a case for the opinion of the High Court.

Tun Aung, for the assessee.

The Government Advocate, for the Crown.

JUDGMENT.

We have heard Mr. Tun Aung. It is perfectly clear that the procedure laid down by section 66 of the Income-tax Act has not been complied with.

This Court has no jurisdiction until the applicant has applied to the Commissioner and complies with the procedure of section 66 in making the application and the Commissioner has refused to state a case. It is clear that the applicant has not done anything of the kind. The application is dismissed with costs, two gold mohurs.

[133] IN THE HIGH COURT OF JUDICATURE AT MADRAS.
Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Beasley.
 [17th August, 1925.]

The Commissioner of Income-tax, Madras ... *Referring Officer.*

Sri Krishna Chandra Gajapathi Narayana Deo,
 Raja of Parlakimedi ... *Assessee**

Income-tax Act (XI of 1922), Secs. 9 (1) (vii), 34 and 66 (2)—Assessee owning residences not actually occupied—Residences kept ready for occupation—Claim for vacancy allowance—Income erroneously exempted from assessment in previous year—If assessable in succeeding year under Sec. 34—"Escaped assessment," meaning of.

Where the assessee owns residences ready for occupation, ready for him to live in when he chooses to do so and actually keeps servants on the premises to get them ready for occupation, he is assessable on their *bona fide* annual value under Sec. 9 of the Income-tax Act. Though the residences may in fact never have been let or lived in by the assessee or his persons during the year of assessment, they cannot be described as vacant within the meaning of Sec. 9 (1) (vii), entitling him to claim the vacancy allowance thereunder.

The Queen v. St. Pancras Assessment Committee, (1877) 2 Q. B. D. 581, followed.

Where the Income-tax Officer on a consideration of the question came to the erroneous conclusion that in a certain year the assessee was not taxable in respect of certain residences owned by him, the assessee can be assessed in the succeeding year in respect of income from such property under Sec. 34 of the Act, as income which escaped assessment in the previous year.

The expression "escaped assessment" in Sec. 34 of the Act applies to cases where the Income-tax Officer has deliberately adopted an erroneous construction of the Act, just as much as to cases where the Officer has not considered the matter at all but simply omitted the assessable profits from his view and from his assessment.

Cases [Referred Cases Nos. 3 of 1924 and 8 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE. [No. 3 of 1924.]

Under section 66 (2) of the Income-tax Act, I have the honour to refer the following questions for the decision of the High Court:—

(1) Whether the interest on arrears of rent charged by a landholder to his tenants is 'agricultural income' within the meaning of section (2) (1) (a) of the Income-tax Act†, and

(2) Whether income which the Assessing Officer in 1922-23 deliberately retained from taxing can be taxed in 1923-24 under section 34 of the Income-tax Act.

The petitioner in this case is the Raja of Parlakimedi. He was assessed on a taxable income of Rs. 1,78,189. This income included two items now in dispute, viz., (a) a sum of Rs. 8,791 taxed as interest on arrears of rent, and (b) a sum of Rs. 9,550 taxed under section 34 as rental value of certain houses which the Assessing Officer had not taxed in the previous year on the ground that they were vacant. In the appeal petition before me, the appellant contended that interest on arrears of rent was either agricultural income under section 2, or casual gain under section 4(3) (vii). I declined to make the allowance claimed, as I held that the definition of agricultural income in section (2) (1) did not cover interest, and I pointed out that the appellant had such income in the previous year and that the item was therefore a recurring one. With regard to item (b), I held that section 34 permitted action being taken in the subsequent year in respect of the income of the previous year that

* (1926) I. L. R. 49 Mad. 22; 50 M. L. J. 63; 22 L. W. 822; A. I. R. (1926) Mad. 287; 91 Ind. Cas. 940.

† On the hearing of this reference, the Government Pleader on behalf of the Commissioner of Income-tax withdrew his contention upon this question.—Ed.

had escaped assessment for any reason. The appellant is dissatisfied with these decisions, and under section 66 (2) has claimed a reference to the High Court. As points of law are involved, I make reference as stated above.

In my opinion both the items are taxable. It appears to me that interest on arrears of rent is clearly income derived from money-lending, and not from land. My view is supported by the observations of Mr. A. V. Viswanatha Sastri on page 21 of his book, *The Law and Practice of Income-tax*. It is also in accordance with the rulings given by the Madras Board of Revenue under the old Act. I have no doubt that those rulings were correct. As regards section 34, it appears to me clear that the legislature did not intend to confine the section to cases in which the income had escaped assessment through oversight. The section reads "if for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year", and in my opinion, these words enable the Income-tax Officer to remedy mistakes made by his predecessor or by himself.

CASE. [No. 8 of 1925].

As directed by the High Court in the order of the Hon'ble Mr. Justice Kumaraswami Sastri dated 17th March, 1924, I have the honour to refer the following question for the decision of the Hon'ble the Judges of the High Court under section 66 (3) of the Income-tax Act.

"Whether under section 9, clause (1), sub-clause (vii) of the Income-tax Act, XI of 1922, the buildings in the schedule hereto mentioned are exempt from income-tax for the period found vacant."

SCHEDULE.

1. The Taylor's bungalow or the guest house at Parlakimedi.
2. The Bungalow at Cantpet (sic) in Berhampur.
3. Hall's Gardens at Kilpauk, Madras.
4. The new palace at Karandikaspa or Bosonto Nibas.

A copy of the judgment of the Hon'ble Mr. Justice Kumaraswami Sastri was served on me on 24th February, 1925.

2. The Hon'ble Judge has in his judgment observed: "The question for decision is whether the instruction referred to at page 86 of the Income-tax Manual, 1922 (instruction 32) as to houses reserved for private occupation is *ultra vires*. There is a substantial question of law."

3. In the course of his assessment for 1923-24, the assessee was taxed on the annual value of the buildings owned by him. He claimed that the vacancy allowance referred to in section 9 (1) (vii) should have been given in respect of the four buildings mentioned above on the ground that they were only occupied for part of the year.

Bungalow No. 1 is kept by the Rajah as a guest house for Government Officers and others visiting Parlakimedi.

Bungalow No. 2 is only used when the Rajah or his Officers visit Berhampur.

Bungalow No. 3 is only occupied for about two months in the year when the Rajah visits Madras during the season.

Bungalow No. 4 is occupied during the hot weather.

4. In my opinion the vacancy allowance cannot be claimed in respect of buildings which are reserved by the owner for his own occupation or for that of his guests. In the case of property occupied by the owner tax is levied under section 9 on an hypothetical income. The period during which the owner or his guests are in physical occupation of the buildings does not affect that hypothetical income. In a sense buildings reserved by an owner for his own use are always in his occupation. He is free to go and live in them at any time and he always keeps some servants in

charge of them on his behalf. Any other interpretation appears to me to be absurd. It would, for instance, involve the Income-tax Department in elaborate inquiries regarding petty claims for vacancy allowance in respect of guest rooms which were not occupied continuously.

5. As regards the observation of the learned Judge referred to in paragraph 2 above, it is not claimed that the instructions given in Part III of the Income-tax Manual have any statutory force. They are merely executive instructions designed to secure a desirable uniformity in the administration of an All India Act. In the past the vacancy allowance now claimed had been admitted by some assessing Officers and refused by others.

T. R. Ramachandra Ayyar, for *L. A. Govindaraghava Ayyar* (with *L. S. Viraraghava Ayyar*), for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

COUTTS TROTTER C. J.—The short point here is whether certain bangalows which belong to the Raja of Parlakimedi are, or are not, assessable under section 9 of the Indian Income-tax Act, XI of 1922. The sub-section material to this question is sub-section 1 (vii):—"In respect of vacancies, such sum as the Income-tax Officer may determine, having regard to the circumstances of the case." The question we have to determine is, what the section means by 'vacancies'. The executive authorities have issued for the guidance of their officers a manual and this case has been put forward in the form of asking us to say whether instruction 32 of the Manual is in consonance with the words of the Act. Ordinarily we should not view the matter from that point of view, because the Manual, which is called notes of instructions, is obviously merely a document for the guidance of officials. All we have to determine is two short questions: first, whether these bangalows in the circumstances of the case can be described within the meaning of the section as being vacant and the second question, which I shall deal with separately in a moment, as to whether the assessment in this case can be made retrospective for one year under the provisions of section 34. To take the first question, the Manual says outright that the sub-section only applies to property which is usually let to a tenant. Without deciding whether that is correct or not, and whether a man who had a house that he never let, but who dismantled it and locked it up for the year would or would not be assessable, it is clear that these houses are, in fact, never let. The description in the case stated by Mr. Strathie is quite clear. "Bungalow No. 1 is kept by the Rajah as a guest house for Government Officers and others visiting Parlakimedi. Bungalow No. 2 is only used when the Rajah or his officers visit Berhampur. Bungalow No. 3 is occupied only about two months in the year when the Rajah visits Madras during the season. Bungalow No. 4 is occupied during the hot weather," obviously by the Rajah. It is clear from the way in which the case is framed that the contention put forward was that, although these bangalows were ready for occupation and therefore must necessarily have been equipped with the furniture necessary for the occupation of the Rajah, they are not assessable, if, in fact, it so happened in any one year that they were not lived in by the Rajah or the other persons in question, guests or officers of the Rajah's staff. In my opinion there is nothing in the section to warrant that construction and if a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so—and there is a statement here that not only was that the case but that servants of the Rajah were actually kept on the premises in order to get it ready for occupation whenever he wanted to go there—he is assessable. In these circumstances I think that the case falls within the exact words of Lush J. in *The Queen v. The Assessment Committee of St. Pancras* (1). The words are to be found at page 588 where

(1) (1877) 2 Q. B. D. 581.

the learned Judge says this : " If, however, he (that is, the owner) furnishes it (that is, the vacant house) and keeps it ready for habitation whenever he pleases to go to it, he is an occupier though he may not reside in it one day in a year. " That seems to me to be conclusive and I respectfully agree with that view and think that that is the proper construction of the statute. In my opinion, therefore, the assessee is liable for assessment in respect of all the bungalows referred to in the case.

The next point is whether the assessment can be made retrospective. It appears that in the previous year the Income-tax Officer had to consider the question and came to the conclusion that the Raja was not assessable in respect of these bungalows. The section of the English Act of 1918, section 125, is quite clear, because it provides expressly for the case where an allowance or exemption or abatement unauthorised by the Act has been deliberately made by the predecessor of the Surveyor with whom the section is concerned. The Indian Act (section 34) is not quite so explicit. What it says is this:—"If for any reason income chargeable with income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, within a year, serve a notice". It is said that "escaped assessment" must mean, not that the question has been considered and decided in favour of the assessee, but that the Income-tax Officer has omitted to consider the question at all, or was unaware of the existence of the property now sought to be taxed and therefore passed it over and that it does not apply to cases where the Income-tax Officer on consideration came to the conclusion, *ex hypothesi*, an erroneous conclusion, that the property in question was not assessable. It seems to me that that construction is forbidden by the alternative case put in the section. "Where the income.....has been assessed at too low a rate", that cannot be a matter of mere inadvertence; that must refer to a deliberate assessment made by the Income-tax Officer in the preceding year with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words "escaped assessment" and that it applies to cases where the Income-tax Officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the Officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment. In my opinion, the questions referred to us must both be answered adversely to the assessee and it must be held that the property referred to us is not property describable as vacant during the year of assessment and that there is nothing in the statute to prevent the assessing Officer from recovering income-tax for the previous year as allowed by section 34.

Rs. 150 will be allowed for costs in each case.

BEASLEY J. :—I agree.

[134] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice

Beasley.

[17th August, 1925.]

Rathan Singh, Proprietor, Rathan

Singh Motor Service, Madura

v.

...

Assessee.

The Commissioner of Income-tax, Madras

...

Referring Officer.

Income-tax Act (XI of 1922), Sec. 10 (2) (vii)—Assessee letting motor-cars for hire—Total destruction of car by accident—Sale as scrap iron—Loss on sale, if claimable as obsolescence allowance—"Obsolete," meaning of.

Where the assessee carrying on business by letting motor cars for hire sold as scrap iron one of his cars which was totally destroyed by accident rendering it unfit for the purpose for which it was originally intended and claimed a deduction of the loss caused to him thereby as obsolescence allowance under Sec. 10 (2) (vii) of the Act.

Held, that the allowance claimed was not permissible as the car could not be said to have been sold as "obsolete" within the meaning of Sec. 10 (2) (vii) of the Income-tax Act.

"Obsolete" machinery means machinery which has got out of date through supersession by later machinery more suited to its purpose and which, though able to perform its functions, is not in common parlance sufficiently up-to-date to make it machinery that a prudent man would continue to use.

Case [Referred Case No. 14 of 1924] stated under Sec. 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in compliance with the order of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 13th August, 1924 and reported in 1 I. T. C. 389.

CASE.

As required by the High Court's order quoted above, I have the honour to submit under section 66 (3) of the Income-tax Act for the decision of the Hon'ble the Judges of the High Court the following statement of the case relating to the assessment of Mr. Rathan Singh for the year 1923-24 together with my opinion on the following question of law propounded by the Hon'ble Mr. Justice Kumaraswami Sastri:—

"Whether the total destruction of a machinery which renders it unfit for the purpose for which it was originally intended and a sale of it as scrap-iron entitles a person under sub-clause (vii) of section 10 (2) to claim allowance?"

2. The assessee carries on business in Madura by letting out motor cars for hire. In the course of the assessment for 1923-24, he claimed before the Income-tax Officer, Madura, an allowance of Rs. 8,563 against his income of the year on account of the loss caused to him by the breakage of Wichita Car No. 318 in an accident. The Income-tax Officer issued a preliminary order in which he disallowed this claim. The assessee sent a representation objecting to the disallowance in which he stated as follows:—

"The loss incurred by the car having been broken and dashed off in the course of the work is a loss to the assessee in his business during the year and should be charged to loss account. The broken parts thereon can of course value a sum of Rs. 200 and odd if at all some recoveries could be realised therefrom."

The Income-tax Officer declined to admit the claim. The petitioner thereupon appealed to the Assistant Commissioner under section 30 of the Income-tax Act. In reply to an inquiry from the Assistant Commissioner, the Income-tax Officer reported as follows on this point:—

"No information was given either to the probationary Income-tax Officer who examined the assessee's accounts or to me in reply to my order of assessment as to whether the car which is said to have been broken is fit for use after any necessary repairs are done, or whether it was discarded as completely useless or sold and in the latter case, what the scrap value or the amount for which it was actually sold was."

After hearing the petitioner's Vakil the Assistant Commissioner decided that the car was not sold because it became obsolete, but because, according to the Vakil himself, it was damaged in an accident.

3. The assessee then put in a review petition to the Commissioner and prayed that in the event of the Commissioner not granting his prayer, the question of the right of the assessee to the deduction may be referred to the High Court under section 66 (2) of the Act. The Commissioner declined to grant his request or to make a reference to the High Court on the ground that the loss of Rs. 8,563 was

obviously a capital loss, that the car was not sold in consequence of its having become obsolete, that section 10 (2) (vii) only applied to machinery which had been superseded by machinery of later and improved design and that no question of law was involved.

4. My opinion on the question which I am now ordered to refer is that the total destruction of a machine rendering it unfit for the purpose for which it was originally intended and a sale of it as scrap-iron does not entitle a person to claim the allowance provided in section 10 (2) (vii). That clause recites that the allowance referred to therein is to be granted in respect of any machinery or plant which in consequence of its having become obsolete has been sold or discarded. The Select Committee which examined the Bill which subsequently became Act XI of 1922, stated that the clause had been put in its present form so as to make it clear that the allowance to be granted under it is a pure obsolescence allowance and is not to be granted where machinery or plant is sold for reasons other than obsolescence. The decision of the question therefore turns upon the construction to be placed on the word 'obsolete'. The meaning given to that word in Murray's English Dictionary is "what is no longer practised or used; fallen into disuse; of a discarded type or fashion; disused; out of date". The case of a car which has become useless by reason of damage sustained in an accident cannot therefore come within this clause.

5. The departmental view has always been that the allowance provided in this clause is admissible only in the case of machinery which has been superseded by machinery of later and improved design. In support of this position I would invite reference to the following extract from an English authority on the subject—Spicer and Peglers' Income-tax in relation to accounts: "In certain cases also allowance is made for loss through obsolescence. Where new and improved machinery is introduced in place of machinery not wholly worn out, a deduction is allowed of so much of the cost of replacement as is equivalent to the written down value of the machinery replaced, less any sum realised by the sale of it." The Board of Inland Revenue in England have explained the nature of the allowance in a memorandum issued by them in 1918 as follows:—

"The necessity for this allowance (obsolescence) arises from the fact that machinery has frequently to be replaced before it is worn out owing to its having become obsolete and incapable of competing with more up-to-date machinery." This explanation of the nature of the allowance under the English Act is applicable *mutatis mutandis* to the Indian Act.

6. It is one of the fundamental principles of income-tax legislation both in India and in England that capital losses are never allowed in income-tax assessment unless specifically provided for in the words of the statute. It is equally true that profits arising from capital transactions are not liable to be taxed. I am fortified in this conclusion by the remarks of Schwabe C. J., in *Board of Revenue v. Ramanathan Chettiar* (1) where he states: "It does not seem probable that the legislature meant to provide a deduction for losses on sales of machinery by manufacturing concerns without at the same time bringing into account as profits any profits that might be made on such sales. Sales of machinery are sales of parts of the capital of a concern of this kind and the resulting profits or losses on such sales are dealt with quite apart from this section."

The learned Judge with whose order I am now complying has commented in that order on the apparent anomaly of granting an allowance where machinery is discarded while still in working order, and refusing such grant when the machinery has been destroyed by an accident. In each of these cases, no doubt, the owner of the machinery has suffered a certain loss of capital. But a loss of the former kind,

(1) 1 I. T. C. 244 at p. 247.

due to improvements in manufacturing method resulting from new inventions, is from its very nature difficult to anticipate and guard against; whereas every prudent man of business is expected to protect himself by insurance against loss due to accident. The framers of the Income-tax Act have recognized this fact by allowing in sub-section (2), clause (iv), of section 10 as a deduction under the head 'business' "in respect of insurance against risk of damage or destruction of buildings, machinery plant, furniture, stocks or stores, used for the purposes of the business, the amount of any premium paid". Where an assessee has followed the ordinary business practice of insuring his machinery against accident, the loss arising from its destruction falls not upon him but upon the insurance company; while, if he has been so imprudent as to neglect the customary measure of precaution it is not just that the public revenue should suffer on account of his neglect.

K. V. Sesha Aiyangar, for the assessee,

M. Patanjali Sastri, for the Crown.

JUDGMENT.

It is a little difficult to see what exactly the reference of the learned Judge is. The argument appears to have been as to whether machinery which was totally destroyed by an accident, in this case the machinery being a motor car, was to be regarded as obsolete within the meaning of section 10 (2) (vii) of Income-tax Act. But then later on the learned Judge goes on to say that it is desirable to have an authoritative ruling on the question whether the total destruction of machinery which renders it unfit for the purpose for which it was originally intended and the sale of it as scrap iron entitles the owner under this section to claim allowance. That must mean whether machinery in that condition and in those circumstances is properly described, within the meaning of the section, as obsolete. In my opinion no such question can possibly arise. 'Obsolete' as applied to machinery means machinery which has got out of date because it has been superseded by later machinery more suitable to its purpose and therefore, although able to perform its functions, it is not in common parlance sufficiently up-to-date to make it machinery that a prudent man would continue to use, but machinery which he would replace as being in the ordinary meaning of the term obsolete. There is no question for us to answer except to say that in our opinion there is nothing in the facts of this case which brings this machinery within the definition of the word 'Obsolete'.

Government will be entitled to their costs.

[135] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Coyajee.

[18th August, 1925.]

The Commissioner of Income-tax, Bombay ...

Referring Officer.

v.

M. H. Sanjana and Co., Ltd. ...

*Assessee**

Income-tax Act (XI of 1922), Secs. 25 (3) and 26—Change in ownership of business—Continuance of business by transferee thereof—Business, if 'discontinued'—Claim for refund of tax.

A company started in 1919 went into voluntary liquidation about the end of 1922 and the liquidators, on 20th July, 1923, transferred the business including all stock-in-trade, goodwill, etc., to a new Company which continued the business. The Company was assessed to income-tax and super-tax for the year 1st April 1922 to 31st March 1923 on the profits of the 'previous year,' calendar year 1921, amounting to Rs. 3,79,408. At the time of assessment

* (1926) I. L. R. 50 Bom. 87; 27 Bom. L. R. 1471; A. I. R. (1926) Bom. 129; 92 Ind. Cas. 517.

for the year 1923-24, the assessee (the liquidators) submitted the accounts of the Company for the period 1st January 1922 to 30th November 1922 disclosing a profit of Rs. 1,99,208 and claimed under Sec. 25 (3) of the Income-tax Act to substitute the said profits of Rs. 1,99,208 for the eleven months up to 1st December 1922, in the place of the profits of Rs. 3,79,408 for the calendar year 1921 and get a refund of tax overpaid.

Held, that though the ownership of the business was changed, the business was not 'discontinued' within the meaning of Sec. 25 (3) of the Act and consequently the claim for refund was not maintainable thereunder.

Per Macleod C. J.: Under the Income-tax Act, the tax is chargeable on the profits of a business and it makes no difference if there is any change in the person who carries on the business so long as the business is continued.

Case [Civil Reference No. 4 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Bombay, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, India (hereinafter referred to as the Act) and at the instance of Messrs. S. B. Billimoria and Co., Liquidators of Messrs. M. H. Sanjana and Co., Ltd., (hereinafter called the petitioners), I have the honour to submit for your Lordships' opinion a question of the interpretation of section 25 (3) of the Indian Income-tax Act, 1922 as set out in para. 5 below.

2. The reference arises out of an application made by the petitioners to be allowed the benefit of the above section 25 (3) of the Act by substituting for the purpose of their 1922-23 assessment, the profits for the eleven months from 1-1-1922 to 30-11-1922 in place of the profits for the calendar year 1921 on which profits the said assessment was levied that year.

3. *The facts of this case are briefly as follows* :—

Messrs. M. H. Sanjana & Co., Ltd., were doing business in Bombay as "Merchants, Commission Agents, Contractors, Suppliers of Stores of every description, Ship Chandlers, Mechanical Engineers, Machinists and Mill-wrights." (This is the description of their business as given by them in the agreement to sell their business (Ex. A).

The Company was started in 1919 and did business up to about the end of the year 1922 when it was resolved to take it into voluntary liquidation. Its business was then sold to another company under an agreement dated 21-2-1923 under which all the stock-in-trade, furniture, fittings, machinery and plant, motor cars, buildings and lands, the lease of the Office premises at Elphinstone Circle, *the goodwill of the business including all trade marks* and the benefit of all running contracts belonging to the petitioners were taken up by Messrs. Ahmedbhai Currimbhai and Albert Raymond on behalf of the "Consolidated Mills Supplies Co., Ltd." that was then being formed. A copy of this agreement is submitted herewith* (Ex. A) as it is of importance in deciding the question that has arisen in this case. The business which was so far being conducted by the petitioners then began to be conducted by the new Company.

For the year 1922-23, Messrs. M. H. Sanjana & Co., Ltd., was assessed to income-tax and super-tax on profits amounting to Rs. 3,79,408 for the calendar year 1921. At the time of the 1923-24 assessment, the petitioners submitted the accounts of the company from 1-1-1922 to 30-11-1922. These disclosed a profit amounting to Rs. 1,99,208. The petitioners claimed that under section 25 (3), the Company was not liable to pay any tax on this profit and that, on the other hand, as regards the assessment for the year 1922-23, it was entitled to substitute the profit of Rs. 1,99,208 for the 11 months up to 1-12-1922 in place of the profit of Rs. 3,79,408 for the year 1921 and get a refund of the tax overpaid. This claim for refund was disallowed on the ground that section 25 (3) of the Act was applicable only to cases in which business was discontinued entirely and not to cases in

*Omitted in the present report.

which it was transferred from one set of proprietors to another and that, under section 26 of the Act the Consolidated Mills Supplies Co., Ltd., as successors to the business were liable to be taxed on the profit made by the petitioners in the year 1922 and they were taxed accordingly.

5. *Question for decision by the High Court.*

The petitioners have not categorically framed the question which they want me to refer to your Lordships but from their several applications, I infer that they want the Hon'ble Court to state its opinion on the following points :—

"Is section 25 (3) applicable only to cases in which a business is entirely stopped so that no one carries it on after an assessee has ceased doing it, or to cases in which after an assessee has ceased doing it it is not stopped but is continued by a different proprietor or set of proprietors." In other words—"Does section 25 (3) allow relief to an assessee only when his business is entirely stopped, or even when it is not at all stopped but is merely transferred by him to another proprietor, he himself ceasing to do the business."

In the present case, therefore, your Lordships have to state whether even though the business carried on by the petitioners was continued by the Consolidated Mills Supplies Co., Ltd., the petitioners were entitled to relief under section 25 (3) or not.

6. *Commissioner's opinion as regards the question referred to the High Court* :—As section 66 (2) requires me to give my own opinion on the above question while submitting the reference to your Lordships, I give it in the following paragraphs :—

7. The question for decision is one of interpretation of section 25 (3) of the Income-tax Act, 1922. This section runs as under :—

"25 (3). *Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference.*"

A mere glance at the words in italics in the above section will suffice to convince your Lordships that it lays down as clearly as possible that when a business **itself** is discontinued, it is entitled to relief as laid down therein. What can the meaning of the words "where any business is discontinued" possibly be? They can only mean that there is an end to the business, that there is a total stoppage of it and that it is not continued by any one. No amount of quibbling will make one say that a business that is continued is to be taken as discontinued. If *A* stops doing a business which *B* continues, can we say that the business is discontinued? All that he can say will be that *A* has stopped doing it and not that the business has been discontinued. The business continues all the same with this change that instead of *A*, *B* is now conducting it. A mere change in the ownership of a business has never been held to amount to its discontinuance. In the case under reference, Messrs. M. H. Sanjana & Co., Ltd., have stopped doing the business, but as the Consolidated Mills Supplies Co., Ltd., has taken it up and continued it, it cannot be said to have been discontinued. It would have been discontinued if no one had taken it up as a going concern. In that case, some person or persons would have purchased the stock-in-trade, some one would have taken away the machinery, some one else would have purchased its buildings, the contracts would have been terminated

and the goodwill and trade marks would not have been taken up by any one. Then there would have been an end to the business and section 25 (3) would have undoubtedly applied.

8. Whether a business is continued or not is a question of fact with which I would not like to trouble your Lordships, but in case it is deemed advisable to go into this question too to arrive at a proper decision in the matter, I would respectfully invite attention to the copy of the Agreement Ex. A, dated 21st February, 1923, submitted herewith*. According to it the new Company takes up all the buildings and lands, the lease of the office premises, plant, machinery, motor cars, stock-in-trade, furniture and fittings, the goodwill of the business including all trade marks, and the benefit of all the contracts entered into by the petitioners with various firms and other limited companies. This can only mean that the new Company took up the entire business of the petitioners including its goodwill, trade marks and running contracts. The very word "goodwill" is defined in the Concise Oxford Dictionary as meaning "privilege granted by seller of business of trading as recognised successor." Hence there can be no doubt that the new Company continued the business of the petitioners as their *recognised successors in business*. To such cases section 25 (3) of the Act does not apply but section 26 which renders liable to tax the successors in the business.

9. In this connection, I beg to invite your Lordships' attention to the English case of *Bartlett v. Commissioners of Inland Revenue* (1). That case was, as far as the interpretation of the phrase "discontinuance of business" is concerned, on all fours with the present case. A business was in December 1908 sold by its owner to a company. He contended that the business was discontinued from that date. The Court held that the business was not discontinued. For facility of reference I quote below the following extract from the judgment of the learned Judge who decided that case :—

"The last point, as I understand, taken in the case, is this. Section 24, subsection 3 of the Finance Act, 1907 provides that 'where a profession, trade or vocation is discontinued in any year, any person charged or chargeable with income-tax in respect of that profession, trade or vocation shall be entitled to be charged on the actual amounts of the profits or gains arising from the profession, trade or vocation in that year'. It is said that the appellants' trade having been discontinued in the year, he was only chargeable on the actual amount made in that year, and there was no power to go back to the three years' average. The answer to that appears to me to be very simple. The trade was not discontinued in the year, the trade was sold to a company and continued during the whole year; and in my view, therefore, section 24 of the Act of 1907 has no application to this case."

Your Lordships will easily see that the provisions of section 25 (3) of the Act are based on the provisions of this section 24 of the Act of 1907 and that the ruling of the learned Judge will apply without any modification to a case under this section 25 (3) of our Act.

10. The above decision of the King's Bench makes it clear that a business cannot be said to be discontinued when a particular individual on selling it to another person ceases to carry it on. In the present case, the business was sold to the new Company. Hence though the petitioners themselves stopped doing it, the business itself was not discontinued. It was continued by the new Company which became liable to tax under section 26 of the Act and the petitioners were not entitled to any relief under section 25 (3). My answer to the questions raised in para. 5 above is therefore that section 25 (3) allows relief only when a business is entirely

*Omitted in the present report.

(1) (1914) 3 K. B. 686; 7 Tax Cas. 229.

stopped and not continued by any one and that in cases where a business is merely transferred from one set of proprietors to another no relief is due but that the successors become liable under section 26 of the Act. The petitioners are therefore not entitled to any relief.

11. Before concluding, I will deal briefly with the arguments which were advanced before me by the petitioners in their favour. In their application to me dated 17th November last, they admitted that the business "was sold to the Consolidated Mills Supplies Ltd., for a consideration mentioned in the agreement." They, however, argued that because they themselves had stopped doing business, they were entitled to relief because "income-tax is a tax on the individual for income derived from the sources mentioned in the Indian Income-tax Act and not on business." This argument can have no force as far as section 25 (3) of the Act is concerned. It definitely allows relief only in cases in which a business is entirely stopped and that has nothing to do with the question as to who pays the tax. Also it is not at all correct to say that income-tax is payable by an individual and not by a business. Income-tax is payable by a business through its proprietors. Business is a source of income mentioned in section 6 which is made chargeable to income-tax by that section and I cannot see what force can there be in contending that income-tax is not payable by a business. The argument being irrelevant as far as the interpretation of section 25 (3) of the Act is concerned, I do not wish to trouble your Lordships further about it.

12. Another argument advanced was that this was not a case of reconstruction of the old company and that under the provisions of the Indian Companies Act, as soon as a company went into liquidation, its corporate powers ceased and the assets became distributable amongst its creditors and shareholders. This argument has absolutely nothing to do with section 25 (3). One proprietor must necessarily entirely sever all his connection with a business before another can become its owner. There is no point in arguing about reconstruction as it is not at all necessary for the purposes of section 25 (3) of the Act that the new owner should have anything in common with the outgoing proprietor. They may have absolutely no connection with each other. Still the business is continued all the same. The provisions of the Indian Companies Act *re* : winding up of a company have nothing to do with the Income-tax Act.

13. It has been also stated before me on behalf of the petitioners that if relief is not allowed when a business passes from one person to another there can be no case at all in which relief can be allowed under section 25 (3). The petitioners in their petition to me dated 17th November state :

"We may mention here that if the Act were to be interpreted in the manner it has been done by the Income-tax authorities so far, we are of opinion that the benefit under section 25 (3) cannot be given in any case. As a matter of fact if a business passes from hand to hand and if it is made liable to assessment, the relief provided for under the said section cannot be made avail of in any case."

I cannot but submit with reference to this that the petitioners are entirely mistaken. There are any number of cases in which relief has been allowed under section 25 (3) and your Lordships will have, I think, no difficulty in recalling actual cases in which business has been entirely stopped and discontinued. When an individual closes down his business without transferring it to any one, he would clearly be entitled to relief. In this very case, if the liquidators had not sold the business *en bloc* to the new Company but disposed of the stock-in-trade, buildings, machinery, plant, etc., by public auction or by private negotiations to several individuals and not transferred the goodwill to any one, there would have been a clear case for relief under section 25 (3).

14. The above are all the arguments that have been advanced before me. They fail to convince me of the right of the petitioners to the relief applied for.

When section 25 (3) distinctly says that relief is to be given when a business is discontinued, we are bound to confine relief only to cases which strictly comply with this condition. If the legislature had intended to give relief to cases like that of the petitioners, it would have worded section 25 (3) so as to state definitely that when an assessee discontinued doing his business or ceased exercising his profession or vocation he would be entitled to relief. This is quite different from saying that when a business, profession or vocation is discontinued relief should be given. The decision of the King's Bench in the case referred to above settles what the meaning of the words "where a business is discontinued" should be.

15. A copy of your Lordships' opinion may kindly be certified to me as required by section 66 (5) of the Act to enable me to take further action in accordance therewith.

Kanga, Advocate-General, with *A. Kirke-Smith*, Government Solicitor, for the Crown.

Sir Chimanlal Setalvad, instructed by *Payne and Co.*, for the assesseees.

JUDGMENT.

MACLEOD C. J.—This is a case stated by the Commissioner of Income-tax under section 66 (2) of the Income-tax Act, XI of 1922, and referred to the High Court with the opinion thereon of the Commissioner, at the instance of the assesseees, the liquidators of Messrs. M. H. Sanjana & Company, Limited (in voluntary liquidation), hereinafter called the Company. The Company was started in 1919 to carry on the business of merchants, commission agents, contractors, suppliers of stores, ship-chandlers, etc., and did so until the end of the year 1922, when it was resolved to take it into voluntary liquidation.

On the 21st February, 1923, the liquidators entered into an agreement with Ahmedbhoy Currimbhoy and Albert Raymond on behalf of a new Company to sell to the new Company when incorporated the business including all the stock-in-trade, furniture, fittings, machinery and plant, motor cars, buildings and lands, the lease of the office premises at Elphinstone Circle, the goodwill of the business including all trade marks and the benefit of all running contracts.

By an agreement dated the 20th July, 1923, between the Company and its liquidators of the 1st part, Ahmedbhoy Currimbhoy and Albert Raymond of the 2nd part, and the new Company of the 3rd part the above-mentioned agreement was adopted. The business which up to that time had been carried on by the assesseees began to be conducted by the new Company. For the year 1st April 1922, to the 31st March 1923, the Company was assessed to income-tax and super-tax on the profits amounting to Rs. 3,79,408 for the calendar year 1921. At the time of the assessment for the year 1923-24 the assesseees submitted the accounts of the Company for the period 1st January, 1922, to the 30th November, 1922, disclosing a profit of Rs. 1,99,208. The assesseees claimed under section 25 (3) of the Act that they were not liable to pay any tax on their profit, and that on the other hand as regards the assessment for 1922-23 they were entitled to substitute the profits of Rs. 1,99,208 for the eleven months up to the 1st December, 1922, in place of the profits of Rs. 3,79,408 for the year 1921 and get a refund of the tax overpaid.

This claim for a refund was disallowed on the ground that section 25 (3) of the Act was applicable only to cases in which a business was discontinued entirely and not to cases in which it was transferred from one set of proprietors to another, and that under section 26 of the Act the new Company as successors to the business were liable to be taxed on the profits made by the Company in 1922 and they were taxed accordingly. The question on which the opinion of the Court is required is not very succinctly stated in the letter of reference.

I should prefer to express it as follows :—

On the facts of the case are the assesseees entitled to claim the refund they ask for under the provisions of section 25 (3) of the Income-tax Act of 1922 ?

Section 25 (3) only refers to a business which was in existence at the commencement of the Act, namely, the 1st April, 1922.

If such a business is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance. And the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period.

In this case the term 'previous year' meant the year ending the 31st December, 1921.

It would appear then that the assesseees could claim that the income, profits and gains of the previous year, namely, Rs. 3,79,408, should be deemed to be the income, profits and gains of the period between the end of the previous year and the discontinuance. Then an assessment should be made on the basis of the income, profits and gains of the said period, and if an amount of tax had already been paid in respect of the income, profits and gains of the previous year, exceeding the amount payable on the basis of such assessment, a refund of the difference was payable.

I understand on a proper construction of these words that the assesseees, though the Company had paid in 1922-23 income-tax on the profits for the year 1921 amounting to Rs. 3,79,408, if the Company discontinued its business during the year 1922-23, were entitled to substitute the profit of Rs. 1,99,208 for the eleven months up to the 1st December, 1922, in place of the profit of Rs. 3,79,408 and claim a refund. If that is the real meaning of the section, to my mind it has been expressed in the least intelligible way. I should have thought it would have been simpler to say that if a business in existence on the 1st April, 1922 is discontinued in any particular year and has already paid tax on the profits of the previous year, it becomes entitled to be assessed on the profits of the year in which it is discontinued, so that if those profits are less than the profits of the previous year, a refund is payable. However, the question before us is, whether the assesseees are entitled to resort to section 25 (3) and we are not concerned with the relief they may be entitled to if they are so entitled. The assesseees contend that because the Company stopped its business, they were entitled to relief, that as the Company went into liquidation its corporate powers ceased, and its assets became distributable amongst its creditors, and lastly, that if they were not entitled to relief, the benefit of section 25 (3) of the Act could not be given in any case.

All these arguments are based on a misapprehension of the scheme of the Act.

By section 6 certain heads of income, profits and gains shall be chargeable to income-tax, of which 'business' is one. Business is defined by section 2 (4), and by section 2 (2) an assessee is defined as a person by whom income-tax is payable. By section 10 (1) the tax shall be payable by an assessee under the head 'business' in respect of the profits or gains of any business carried on by him.

In the case of a company, by section 22 (1) the principal officer shall present to the Income-tax Officer a return of the total income of the Company for the previous year and under section 23 the Income-tax Officer makes the assessment, and determines the sum payable by the assessee.

By section 26 when any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted or on the person engaged in the business, profession or vocation as the case may be, at the time of the making of the assessment.

As then the tax is chargeable on the profits of a business, it makes no difference if there is any change in the person who carries on the business so long as the business is continued. There is no necessity to go beyond the facts of this case, where it is

admitted that the business was continued, the management only passing from the old Company and its liquidators to the new Company when the agreement of the 20th July, 1923, was completed. Exactly the same question was raised in *Bartlett v. Inland Revenue Commissioners* (1). The owner of a business sold it to a company. Under the provisions of section 24, sub-section 3 of the Finance Act, 1907, he claimed that he was only chargeable with tax on the actual amount made in the year of discontinuance and there was no power to go back on the three years' average. Scrutton J. said (page 693) : "The answer to that appears to me to be very simple. The trade was not discontinued in the year. The trade was sold to a company and continued during the whole year ; and in my view, therefore, section 24 of the Act of 1907 has no application to this case." I would answer the question I have framed above in the negative.

The assesseees must pay the costs of the reference.

COYAJEE J.—The statement of the case drawn up by the Commissioner of Income-tax and referred to this Court clearly sets out the material facts. In the year 1919 the Company, Messrs. M. H. Sanjana & Co., Ltd., commenced business in Bombay as merchants, commission agents, contractors, suppliers of stores, ship-chandlers, mechanical engineers, etc. About the end of the year 1922 it was resolved to take the Company into voluntary liquidation. Its business was then sold to another Company, the Consolidated Mills Stores Co., Ltd. The sale included buildings and lands, the lease of the office premises, all the stock-in-trade, machinery, plant, furniture and fittings, the goodwill of the business including all trade-marks and the benefit of all contracts entered into between the vendor Company and various other companies. The business was then continued by the Consolidated Mills Stores Co., Ltd.

For the year 1922-23 M. H. Sanjana & Co., Ltd., were assessed to income-tax and super-tax on profits amounting to Rs. 3,79,408 for the calendar year 1921. At the 1923-24 assessment the Company (in voluntary liquidation) submitted its accounts showing a profit of Rs. 1,99,208 from the 1st January, 1922 up to the 30th November, 1922. They now claim that as their business is discontinued, they are entitled to substitute the profit of Rs. 1,99,208 in place of the profit of Rs. 3,79,408 on which the tax has been levied, and ask for a refund of the difference. They rely upon the provisions of section 25 (3) of the Indian Income-tax Act, 1922, which says : "Where any business, profession or vocation which was in existence at the commencement of this Act, and on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued" etc. The section grants relief if the condition which it lays down is fulfilled. The question arising for consideration then is : Whether this business which was in existence on the 1st of April, 1922, has been "discontinued" ? On the facts of this case it is clear that when the Company sold the business, including the goodwill and the benefit of all running contracts, to the Consolidated Mills Stores Co., Ltd., the ownership of the business was changed, but the business was not "discontinued". The purchaser Company succeeded to the business and continued it—a case which is provided for by section 26. It was, however, contended on behalf of the assesseees, that when they sold the business, it was "discontinued," at any rate so far as they were concerned, and they are, therefore, entitled to claim a refund of the overpaid tax. But the language of the section is clear ; and the question arising under it is—whether the *business* was discontinued ; and not—whether the business was discontinued by A. B. In this case the transfer of ownership left the continuance of the business wholly unaffected. In my opinion, therefore, the assesseees are not entitled to claim the refund which they ask for.

[136] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Coyajee.

[19th August, 1925.]

Haji Rehemtulla Haji Tar Mahomed

...

Appellant*.

v.

The Secretary of State for India

...

Respondent.

Income-tax Act (II of 1886), Sec. 39—Profits made by a resident in Native State—Non-receipt of profits in British India—Assessment of income-tax thereon—Suit for declaration of invalidity of assessment—Maintainability—Profits, where earned—Assessment of profits not received in British India, ultra vires.

The assessee, a resident of the Gondol State, was carrying on business with headquarters in that State and various branch shops in British India and in Baroda State and the income from each shop was received by him directly in his headquarters. The Income-tax Officer, Broach, in assessing the profits of the shop in that City, attempted to assess the profits from the three shops in Baroda State, on the ground that as the goods were purchased in British India in execution of orders received from Baroda shops, the profits from their sales in Baroda State indirectly accrued or arose in British India, though the ultimate profits were made in Baroda State. The assessee thereupon filed a suit for declaration that the Income-tax Officer could not levy income-tax on the income of the Baroda shops.

Held, that it could not be said that the profits sought to be assessed arose in British India because the goods might have come from British India and that as the assessment was *ultra vires*, S. 39 of the Income-tax Act (II of 1886) was no bar to the suit.

Profits are earned where the actual money is earned in excess of the expenditure incurred.

In re, The Aurangabad Mills Ltd., 1 I. T. C. 116 and *Commissioners of Taxation v. Kirk*, (1900) A. C. 588, Referred to.

First Appeal No. 17 of 1923 preferred against the decision of R. E. A Elliot, Esq., District Judge of Broach, in Suit No. 1 of 1921.

Rehemtulla (Plaintiff No. 1) was the owner of the firm of Haji Tar Mahomed, which had its head office at Upleta in Gondol State in Kathiawar. He also resided there. Sultan (Plaintiff No. 2) was his agent at Broach. The firm had several branches in British territory, viz., at Broach, Ankleshwar, Palej, Bombay, Palghar and Tarapur. It had also three branches in the Baroda State, viz., at Miyagam, Karwan, and Badharpur. The income of each shop was received direct by Rehemtulla at Upleta.

The Income-tax Collector at Broach assessed the plaintiff for profits made by the Broach shop in 1916-1917. He also assessed him in Rs. 744-6-0 for profits made by the shops at Miyagam, Karwan and Badharpur.

On January 15, 1918, the plaintiff filed a suit to have it declared that the assessment on the Baroda shops was illegal.

The trial Court dismissed the suit.

The plaintiffs appealed to the High Court.

G. N. Thakor, with M. K. Thakore, for the appellant.

S. S. Patkar, Government Pleader, for the respondent.

JUDGMENT.

MACLEOD C. J. :—The first plaintiff is the proprietor of the firm of Haji Tar Mahomed Hasan. The second plaintiff is the manager of the Broach shop of the firm. Plaintiff No. 1 resides in the town of Upleta in Gondol State in Kathiawar. He has various shops in the British territory, and three shops in the Baroda State. The income of each shop is received direct from the shop by the plaintiff at Upleta. The Income-tax Collector of the Broach City assessed the in-

come of the plaintiffs on the income which was earned and accrued within the British territory. He also sought to levy income-tax on the income earned by the shops in the Baroda State. Eventually the plaintiff had to file these three suits for a declaration that the Income-tax Officer could not levy a tax on the income of the shops of the firm of plaintiff No. 1 situate at Miyagam, Karwan and Badharpur in the Native State of Baroda.

The first question is whether the plaintiff was not barred from bringing these suits by the provisions of section 39 of the Indian Income-tax Act, II of 1886, which says that no suit shall lie in any civil court to set aside or modify any assessment under this Act. If the assessment is clearly *ultra vires*, then we do not think that the provisions of that Act will apply. In this case the Income-tax Collector of Broach seeks to assess a resident of the Gondol State on the profits made in the Baroda State, and unless he can prove that those profits arose, or were received, in British India, then clearly the assessment is *ultra vires*.

It is not suggested that the profits were received in British India, but it is contended that the profits accrued or arose in British India. The Judge held that the plaintiff had proved that fact, but the argument upon which his conclusion is based is clearly fallacious. He says: "For plaintiff it is contended that each branch is a separate entity, the branches in British India merely purchase to order and get their commission on the market price and merely act as any other business would do. The decision is a different one, but I think this is a case in which the profits arise or accrue in British India indirectly, for the profits arise from the growth of the crops, conversion into grain and purchase here though the ultimate profit is made in Baroda State."

If we take an instance, which must constantly be happening, of the manager of a Baroda Branch of the plaintiff's firm sending an order to his commission agent in Bombay for certain bales of cotton, or bags of wheat, and the cotton or wheat is sent to Baroda and sold there at a profit, it cannot possibly be said that the profit arose in British India because the goods may have come from Bombay or some other town in British India. It is quite clear that the profits are earned where the actual money is earned in excess of the expenditure incurred. That was decided in *In re The Aurangabad Mills, Ltd.* (1) where the Court referred to the case of *Commissioners of Taxation v. Kirk* (2).

On the question where the ultimate profits arose which would entitle the Income-tax authority to levy a tax on profits, the Judge admits that the ultimate profits were made in the Baroda State.

We think, therefore, that the profits arose in the Baroda State. The decrees in all the three suits will be reversed on the ground that income-tax was levied without authorisation, and the appeal allowed with costs. Plaintiff will be entitled to refund of the money he has paid, except in F. A. No. 32, where the refund will be limited to the amount claimed in the appeal, viz., Rs. 460.

[137] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Mr. Justice Rutledge, Chief Justice, Mr. Justice Das and Mr. Justice Brown.
[9th September, 1925.]

The Commissioner of Income-tax, Burma ...

Referring Officer.

v.

Messrs. Steel Brothers and Co., Ltd. ...

Assessees.

Income-tax Act (XI of 1922), Secs. 2 (4), 4 (1) and (2), 6 and 42 (1)—Non-resident registered company with headquarters in London—Business operations in Burma—Export of

(1) 1 I. T. C. 116; 45 Bom. 1286.

(2) (1900) A. C. 588.

(1925) I. L. R. 3 Rang. 614; A. I. R. (1926) Rang. 97; 94 Ind. Cas. 466.

raw and manufactured goods to United Kingdom—Sale proceeds received there—Profits of insurance contracts made by Head Office in London in respect of consignments from Burma—Agency commission paid to London office—Profits assessable in Burma, ascertainment of—Money received out of British India when to be deemed accruing or arising in India—Basis of assessment of non-resident—"Business connection," meaning of.

In the case of assessment of a non-resident, section 4 (1) of the Income-tax Act must be read with section 42 (1) and so read together, all profits or gains accruing or arising to him whether directly, or indirectly, through or from any business connection or property in British India become profits or gains "deemed under the provisions of this Act to accrue, or arise or to be received in British India" within the meaning of section 4 (1) and are therefore chargeable under sections 4 (1) and 6 of the Act.

The meaning of the expression "from any business connection" in Sec. 42 (1) of the Act must be strictly confined to the meaning of the word "business" in Sec. 6 as defined by Sec. 2 (4) to be "any adventure or concern in the nature of trade, commerce or manufacture."

The assessee, an incorporated company registered in London as its headquarters, carried on large business operations in Burma, especially in connection with rice, timber and cotton. They had numerous rice-mills, saw-mills, cotton ginning-mills and vegetable oil-mills in Burma where commodities or raw materials were worked up into a form suitable for use. The assessee also purchased commodities in a raw state which were exported out of British India in the same form as when purchased. On an assessment to income-tax, the assessee claimed exemption from tax in respect of profits accrued on sales effected by the London Office of the produce exported from Burma and on insurance contracts entered into by the London Office in respect of these shipments and further asked for an allowance in respect of the commission paid to the London Office for purchases and shipment of stores, etc., from London for the Burma offices.

Held, (1) that the fact of the sale of the produce in London and the receipt of money there did not prevent profits or gains accruing or arising or deemed to accrue or arise in British India from being taxable under the Income-tax Act,

(2) that no distinction in respect of liability to income-tax could be drawn between profits on produce which had undergone some process of conversion in Burma and profits on produce purchased and shipped from Burma in the same form,

(3) that in arriving at the amount of profits assessable under the Act, the Head Office in London should be allowed a reasonable commission agent's commission on the sales and realisation of produce shipped from Burma and such a commission would not be assessable,

(4) that in respect of profits from insurance contracts entered into by the Head Office in London in respect of consignments to it from Burma, such profits were earned in England out of contracts effected there and the fact that the policies were in respect of produce coming from Burma was too remote a connection to justify its assessment as profits deemed to accrue or arise in British India, and

(5) that the commission earned by the London Export Department on stores, etc., purchased and shipped from the United Kingdom to Burma would also not be liable to be assessed to income-tax.

Rogers Pyatt Shellac Co. v. Secretary of State, 1 I. T. C. 363 and *Commissioners of Taxation v. Kirk*, (1900) A. C. 588, followed.

Board of Revenue v. Madras Export Co., 1 I. T. C. 194, dissented from.

Smidth v. Greenwood, (1922) 1 A. C. 419, distinguished.

Case [Civil Reference No. 7 of 1925] stated under section 66 (1) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

Statement of facts and questions referred.

This is a reference made on my own motion under section 66 (1) of the Income-tax Act, 1922. The questions of law on which it is desired that the Hon'ble Judges of the High Court should give a decision have arisen in the course of an appeal preferred before me by Messrs. Steel Bros. & Co., Ltd., against an assessment order of the Assistant Commissioner of Income-tax, Rangoon. The said assessment order was passed by the Assistant Commissioner in exercise of the powers of an Income-tax Officer with which he had been invested by an order passed under section 5 (4) of the Income-tax Act, 1922. Against such an

order appeal lies in accordance with section 30 of the Act to the Commissioner of Income-tax.

2. The facts regarding the assessee and the assessment are set forth in the following paragraphs. Messrs. Steel Bros. & Co., Ltd., are a limited Company registered in London under the English Companies Acts. The headquarters of the business is in London. The Company claims to be, and it is admitted that it is, a non-resident of British India.

3. In addition to their business activities in the United Kingdom and in British India, Messrs. Steels carry on business in Siam. Part of their income is also derived from investments in the United Kingdom. Income from both these sources, viz., business carried on outside of British India and investments in the United Kingdom, do not come under the scope of the Indian Income-tax Act and are not concerned in the present reference. Part of Messrs. Steels' income also is derived from business wholly carried on within British India. As a type of this class of business we may take, for instance, the purchase of paddy in Burma, the milling of it in Burma and the sale of the resulting rice in Bombay. Income from this class of business is admittedly liable to Indian income-tax and it also is not concerned in the present reference. The third class of business carried on by Messrs. Steels involves transactions both in British India and outside of British India. As a type of such transactions we may take business consisting in the purchase of paddy in Burma, the milling of it in Burma, and the sale of the resulting rice in London. It is with the profits from this third class of business that the present reference in part is concerned. The profits arising to Messrs. Steels from business done on account of subsidiary or connected companies are also concerned.

4. Messrs. Steels' business activities in Burma are numerous and there are different departments of their business dealing with imports, insurance, shipping, rice, timber, cotton and produce and oil.

Part of Messrs. Steels' business is carried on direct and part is carried on by means of subsidiary companies. Thus dealing with imports and insurance there is a subsidiary company George Gordon & Co (Burma), Ltd., the whole of the shares in which are held by Messrs. Steels with the exception of a few held by Messrs. Steels' nominees. Another subsidiary company is the Burma Company, Ltd., which carries on part of Messrs. Steels' business in rice.

As regards oil Messrs. Steels carry on the managing agency of the Indo-Burma Petroleum Company, Ltd., in which Company they have large shareholding interests. The relations of Messrs. Steels with this Company will be noticed in detail below.

Of the branches of their business which Messrs. Steels themselves carry on direct, the only departments concerned in the present reference are those dealing with (a) Rice, (b) Timber, and (c) Cotton and Produce. For the purposes of the present reference it is necessary to indicate the extent of Messrs. Steels' activities in Burma in connection with each of the three departments enumerated.

5. The headquarters of Messrs. Steels' business in India is in Rangoon where there is a large staff. In connection with their business in rice Messrs. Steels have mills in Rangoon and also in the principal exporting towns in Burma. Upcountry they also own mills where cotton is ginned and oil-seed pressed. In connection with their timber department Messrs. Steels own saw-mills and also hold leases of Government forests at various places throughout the Province. The same mills and the same staff deal with the goods and merchandise which are the subject both of Messrs. Steels' trade within India and also of their export trade. As regards rice Messrs. Steels purchase paddy in Burma which is milled in their mills in Burma. Of the three resulting products white rice, broken rice and bran all three may be exported. But it does not follow that if one of the products resulting

from the milling of a particular parcel of paddy is exported that the other products will also be exported. They may be sold locally. The three products white rice, broken rice, and bran from a particular parcel of paddy may all be sold in India or they may all be exported; or any of the intermediate permutations and combinations between export and local sale may take place.

6. In the department of Cotton and Produce the principal commodities dealt in are cotton and ground-nuts. As regards cotton, raw cotton (kappas) is purchased and ginned in Messrs. Steels' mills the resulting product being cleaned cotton and cotton seed. The cleaned cotton is baled. Some of it is exported to Europe, some to Japan, and some of it is sold in India. Part of the cotton seed is pressed the resulting products being cotton-seed oil and cotton-seed oil-cake. The cotton-seed oil is sold locally. The cotton-seed oil-cake is exported to Europe. As regards ground-nut Messrs. Steels purchase ground-nuts and press them in their mills. Of the two resulting products ground-nut oil and oil-cake all the oil-cake is exported to Europe. The ground-nut oil is all sold locally.

As regards the timber business I cannot give a more succinct account than has been supplied by Messrs. Steels themselves. The following is an extract from their letter:—

"All timber extracted from our leased forests or purchased at auction is not converted for shipment to Europe. The logs are converted into the most valuable form of cut timber that their size, shape and quality permit and the squares, planks, scantlings, etc., so produced are exported to the various markets in which they can be most suitably sold or are disposed of locally. In some cases when logs are so inferior as to make it unprofitable to cut up for export or sale locally, they are auctioned by us in the form of round logs."

7. In addition to the commodities purchased in a raw form and exported by them after they had been converted in Messrs. Steels' mills into a form suitable for export Messrs. Steels also in each of the three departments of their business concerned purchase in India produce which they export out of British India in the same form as when purchased. Thus they ship quantities of rice, rice bran, cut timber, ground-nut, oil-cake, beans, etc., which they purchase in a form ready for export and which are submitted to no process before shipment.

None of the commodities exported by Messrs. Steels, however, was after being exported from Burma subjected to any other process before being sold by them.

8. The different items constituting the profits the liability or non-liability of which to Indian income-tax is at issue in the present reference are shown in Messrs. Steels Bros. & Co.'s Profit & Loss account and also in the "Statement of Profits" for the year ending 31st December, 1922 which accompanied Messrs. Steels' return. These items are:—

	£	s.	d.
(a) Profit on Burma Rice in London ...	68,218	14	11
(b) Profit on Timber in London ...	14,163	0	0
(c) Profit on Cotton & Produce in London...	6,816	18	8
(d) Profit on Insurance in London ...	2,507	16	9
(e) London Commission a/c I. B. P. ...	3,667	8	11
(f) Sales Commission, etc., a/c Attock Oil Co., Ltd.	8,354	13	2
(g) London Commission on Stores shipped ...	7,199	0	0

9. It is necessary to examine these items seriatim. It will also be necessary to subdivide some of the items into different categories from the point of view of liability to income-tax.

10. As regards the two items:—

	£	s.	d.
" Profit on Burma Rice in London	68,218	14	11
Profit on Timber in London	14,163	0	0

the following draft of the present paragraph was made by me after interviews with Messrs. Steels' representative and was submitted by me to Messrs. Steel Bros. for their remarks.

"The first two items :—

	£	s.	d.
Profit on Burma Rice in London	68,218	14	11
Profit on Timber in London	14,163	0	0

appear to be entirely homogeneous for the purposes of the present reference. The two sums in question represent the profits accruing to Messrs. Steels, respectively out of their transactions in Burma rice and Burma timber sold outside of British India. Messrs. Steel Bros.' method of accounting for this class of business is such that all the profits are shown as accruing in London or at any rate in the London books. For such business Messrs. Steels, Rangoon, run accounts with Messrs. Steels, London. In the Rangoon accounts the produce, etc., is shown as made over to Steels, London, at the actual cost. Steels, London, are debited with the actual cost incurred in Burma including the price of purchase, the cost of converting or working up and of putting the produce on board a ship as nearly as can practically be ascertained. The figures concerned therefore represent the difference between the final price realised in London and the actual cost in Burma *plus* any further expenses incurred outside of India."

In reply to my letter forwarding the draft Messrs. Steels made the following observation :—

"In this paragraph the description of the method of arriving at invoice cost of rice shipped to Europe obscures a most important fact, *viz.*: that included in 'the cost of converting or working up and of putting the produce on board a ship,' there is an item of 'Milling Hire' charged to London for cost of converting paddy into rice, which leaves a margin of profit in the Burma accounts. It will be readily understood that when mills are employed in milling both for shipment to Europe and for local sales, it is not possible to determine the exact cost of conversion of each lot of rice milled for Europe and a fixed charge is therefore adopted. In our experience of the rice milling industry, the milling hire thus charged is greater than can generally be obtained by selling rice in the local market. Conversely, it is our experience that we can generally buy rice in the local market as cheaply as or at a lower price than the cost to produce the same quality in our own mills inclusive of the above-mentioned milling hire. On these grounds we claim that the price at which we transfer rice to our London accounts is at least as high as could be obtained by selling in Rangoon. Any profit secured over and above this price is therefore, in our opinion, due to the operations of our London house who finance shipments and sell the rice in the various markets to which they have access by virtue of their establishment in London. Such profit we hold does not accrue or arise in India."

"We consider it necessary that the above facts should be brought out in the Statement of Reference."

11. The next item in question, *viz.*, £6,816-18-8 "Profit on Cotton and Produce in London" is arrived at differently. Steels' method of accounting for this department of their business is different to that followed in the case of rice and timber. Formerly up till 1920 the Cotton and Produce department of Messrs. Steels' business was carried on through the medium of a limited company, the Jamal's

Cotton and Produce Co., Ltd., in which Messrs. Steels held half the shares and of which Messrs. Steels were Managing Agents. This company is now defunct and is run by one of their departments. But the former method of accounting as between Steels, London, and this department of the business in Burma has persisted. This is that Messrs. Steels, London, in consideration for the work done at the London end, charge Messrs. Steels, Rangoon, a commission of 2 1/2 per cent. of the sale proceeds received for Cotton and Produce sold by the London Managers out of British India. In the case of this item the actual profit accruing is shown in the Rangoon books, and is shown as a Rangoon Profit. (It is assumed for the purposes of the present reference that the whole of this sum of £6,816-18-8 is of the nature indicated. Strictly it is not so. A sum of £17-15-9 represents the commission on stores shipped by the Export Department of Messrs. Steels, London. If, after the decision of the Court has been obtained, it should be necessary to differentiate between this latter sum and the main sum this can be done. But in the meantime, in order to avoid further complicating a reference that is already complicated enough, the whole of the sum of £6,816-18-8 is assumed to be as stated above).

12. The item "Profit on Insurance in London—£2,507-16-9" is described by Messrs. Steel Brothers as being made up as follows :—

	£	s.	d.
(a) Brokerage and discount allowed on Marine Insurance taken out in London covering rice shipments from Burma ..	2,149	19	10
(b) Agency commission on Fire, Riot and Civil Commotion covers taken out in London on rice stored in Europe ...	357	16	11
	<hr/>		
Total ...	2,507	16	9
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13. The item "London Commission Account—Indo-Burma Petroleum Co., Ltd., £3,667-8-11" is made up as follows :—

	£	s.	d.
(a) Commission earned by Oil Department, London, on sales of wax, etc., in the United Kingdom for account of Indo-Burma Petroleum Co., Ltd. ...	1,058	16	6
<i>and</i>			
(b) Commission earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Co., Ltd., ...	2,608	12	5
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Total ...	3,667	8	11
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14. The item "Sales Commission etc.—Attock Oil Co., Ltd., £8,354-13-2" is made up as follows :—

	£	s.	d.
(a) Allowance from Attock Oil Co., Ltd., to cover administration expenses as Managing Agents as per agreement dated 14th November, 1921 ...	6,374	13	7

(b) Agency Commission received by Steels on Insurance effected by them in London on Attock Oil Co.'s account ..	740	0	5
and			
(c) Commissions earned by Steels' Export Department in London on Stores, etc., purchased and shipped from the United Kingdom to India	1,239	19	2
Total ...	8,354	13	2

15. The item "London Commission on Stores shipped—£7,199-0-0" is described by the Company as arising from "Commissions charged by the Export Department, London, on General Goods, Stores, etc., purchased by London Office and shipped to Steels, Rangoon."

16. As has been stated above the main part of the produce exported by Messrs. Steels in all the three departments of their business concerned consists of produce converted or worked up by them in Burma. But, again in all the three branches of their business, part of the produce exported was purchased by Messrs. Steels in Burma in the same form in which it was exported. It is possible that it will be necessary to differentiate for the purposes of the present reference between each of the two classes of business. In their books Messrs. Steels do not maintain separate accounts for the two classes of business. The extraction of figures showing separately the profit from the two classes of business would involve considerable labour. In the present case the contention of Government is that the whole of the profits concerned from both classes of business are liable to Indian income-tax. Messrs. Steels' contention is that no portion of the profits concerned is liable to income-tax. It is possible that ultimately it will not be necessary to extract the figures in question. Accordingly in order to save trouble I have decided with the consent of Messrs. Steels to adopt for the purposes of the present reference an arbitrarily fixed figure. For all the three departments of Messrs. Steels' business that are concerned it is assumed that of the total profits 80 per cent. arises from transactions in produce which was submitted to some process of conversion or working up in British India and that 20 per cent. arises from transactions in produce which was exported from British India by Messrs. Steels in the same form as when purchased by them in British India. This 80 : 20 proportion is purely arbitrary. If, as a result of the decision of the Hon'ble Judges in the present reference it is necessary to differentiate between the profits of the two classes of business, the exact figures will have to be worked out later on.

According to this arrangement we have the following sub-division of some of the items enumerated in paragraph 8 above :—

I. The item (a) rice profits in London £68,218-14-11 is divided as follows:—

	£	s.	d.
(a) (i) Profits in London on rice, etc., milled in India	54,575	0	0
(ii) Profits in London on rice purchased in India and exported in the same form ...	13,643	14	11

II. The item "Profits on Timber in London" must be similarly sub-divided as follows :—

	£	s.	d.
(b) (i) Profits in London on timber which has been converted or worked up in India ...	11,330	8	0
(ii) Profits in London on timber which has been exported from India in the same form as it was purchased	2,832	12	0

17. As regards the item shown as "London Profits on Cotton and Produce £6,816-18-8," as has been stated above this sum is really wrongly described in the accounts. The particular method of accounting which Messrs. Steels have adopted as regards this part of their business cannot in any way affect the liability or otherwise to income-tax of the profits concerned. There is nothing in this department of Messrs. Steels' business that is fundamentally different to the business done by the Rice Department and Timber Department. The decision of the Court on the liability to Indian income-tax of the profits of the Rice Department and of the Timber Department will be applicable to the profits of the Cotton and Produce Department.

18. The remaining items appear to involve section 42 (1) of the Act. As regards the items "Profit on Insurance in London" and "London Commission on Stores shipped," Messrs. Steels, London, and their branch, Messrs. Steels, Rangoon, are the two parties concerned. In connection with the other items, it is necessary to examine the relation between Messrs. Steels and (a) The Indo-Burma Petroleum Company, Ltd., (b) The Attock Oil Co., Ltd., and (c) The Burma Company, Ltd. The Indo-Burma Petroleum Company, Ltd., was originally founded by Messrs. Steel Bros. & Messrs. A. S. Jamal Bros. each of whom held half of the issued shares. The original authorised capital of the Company was Rs. 1,00,00,000 of which Rs. 93,38,000 was issued almost immediately. The issued shares were held equally between Messrs. Steels and Messrs. Jamals up till the end of 1921 when Messrs. Jamals fell behind. In the last annual statement filed with the Registrar of Joint-Stock Companies of a total of 1,55,950 shares issued, 92,975 shares were held by Messrs. Steel Bros. direct. The original articles of association contain provisions ensuring that in the event of new shares being issued half of every such issue should be offered to Messrs. Steel Bros. & Co., Ltd., and half to Messrs. A. S. Jamal Bros. & Co., and in the event of either of these two parties not exercising its option of taking up its full quota of shares that the other party should have the right of pre-emption before any shares were offered to the public. The Articles of Association also contain provisions that, while certain conditions should continue, Messrs. Steels had the right to nominate, out of a directorate of three, one Director and Messrs. Jamals had the right of nominating another Director. Messrs. Steels and Messrs. Jamals had the right of jointly nominating the third Director. By the Articles of Association it was also laid down that Messrs. Steels should be the Managing Agents of the Indo-Burma Petroleum Co., Ltd., for so long as they were willing to act in that capacity. Messrs. Steel Bros. & Co., Ltd., were precluded from engaging in any other oil business in India and, without the consent of the Indo-Burma Petroleum Co., Ltd., even from holding shares in another oil company in India. The Articles of Association of the Attock Oil Co., Ltd., of 1919 reserve to Messrs. Steel Bros. & Co., Ltd., certain rights as regards the taking up of new shares issued by the Attock Oil Co., Ltd. These rights were exercised through the medium of the Indo-Burma Petroleum Co., Ltd., which holds a large part of shares in the Attock Oil Co., Ltd. By the Articles of Association of the Attock Oil Co., Ltd., the Managing Agency of the Attock Oil Co., Ltd., was reserved to Messrs. Steel Bros. & Co., Ltd. As regards the third subsidiary company, the Burma Company, Ltd., the whole of the shares in this Company are held by Messrs. Steel Bros. & Co. Ltd., and by Assistants in Messrs. Steel Bros. & Co., Ltd.

19. I think it best to refer each item separately and accordingly submit the appended statement of the questions referred :—

Questions Referred.

I. Is the whole or part of the sum of £68,218-14-11 described as London Profits on Rice and consisting of £54,575-0-0 profits on produce which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma

and £13,643-14-11 profits on produce purchased in Burma and exported in the same form as when purchased, liable to Indian income-tax?

II. Is the whole or part of the sum of £14,163 shown as London Profits on Timber and consisting of £11,330-8-0 being profits on timber which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and of £2,832-12-0 being profits on timber purchased in Burma and exported in the same form as when purchased, liable to Indian income-tax?

III. Is the whole or part of the sum of £6,816-18-8 (approximately) described as London Profits on cotton and produce and consisting of £5,453-10-11 (approximately) being profits on cotton and produce which has undergone some process of conversion or working up in Messrs. Steels' hands in Burma and £1,363-7-9 (approximately) being profits on cotton and produce purchased in Burma and exported in the same form as when purchased liable to Indian income-tax?

IV. Is the whole or part of the sum of £2,507-16-9 described as Profit on Insurance in London and consisting of £2,149-19-10 being brokerage and discount allowed on marine insurance taken out in London covering rice shipments from Burma and £357-16-11 being agency commission on Fire, Riot and Civil Commotion covers taken out in London on rice stored in Europe liable to Indian income-tax?

V. Is the whole or part of the sum of £3,667-8-11 described as "London Commission Account, Indo-Burma Petroleum Co., Ltd." and consisting of £1,058-16-6 being commission earned by the Oil Department, London, on sales of wax, etc., in the United Kingdom for account of the Indo-Burma Petroleum Co., Ltd., and £2,608-12-5 being commission earned by Steels' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Co., Ltd., liable to Indian income-tax?

VI. Is the whole or part of the sum of £8,354-13-2 described as "Sales Commission, etc.—Attock Oil Co., Ltd.," and consisting of £6,374-13-7 being allowance from Attock Oil Co., Ltd., to cover administration expenses as Managing Agents as per Agreement dated 14th November, 1921, £740-0-5 being Agency Commission received by Steels, London, on insurance effected by them in London on Attock Oil Co.'s account and £1,239-19-2 being commissions earned by Steels' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to India liable to Indian income-tax?

VII. Is the whole or part of the sum of £7,199-0-0 described as "London Commission on Stores shipped" liable to Indian income-tax?

Opinion of Commissioner.

In this case the plan which I think will be best to follow is first to discuss the general principles of law involved and then to apply these to each of the seven questions stated.

2. At one of the hearings it was put forward by the Barrister who appeared for Messrs. Steels that the principal decided cases on which they rely in their contention that the items of income at present under reference are not liable to Indian income-tax are the cases, *Madras Export Company v. Board of Revenue* (1) and the English case, *Greenwood v. Smidth* (2). The claim of Messrs. Steels, however, is very much wider than the claims put forward against the Revenue authorities either in the *Madras Export Company* case or in *Greenwood v. Smidth* or in any of the other leading English cases. For convenience these English cases may be quoted here: *Sulley v. Attorney-General* (3), *Erichsen v. Last* (4), *Tischler v. Apthorpe* (5), *Pommery v. Apthorpe* (6), *Colquhoun v. Brooks* (7), *Werle and*

(1) 1 I. T. C. 194; 46 Mad. 360.

(2) (1921) 3 K. B. 583; (1922) 1 A. C. 417; 8 Tax Cas. 193.

(3) (1860) 5 H. & N. 711; 2 Tax Cas. 149. (4) (1881) 8 Q. B. D. 414; 1 Tax Cas. 351.

(5) 52 L. T. 814; 2 Tax Cas. 89.

(6) 56 L. T. 24; 2 Tax Cas. 182.

(7) 14 App. Cas. 493; 2 Tax Cas. 450.

Co. v. Colquhoun (8), *San Paulo Railway Company v. Carter* (9), *Crookston Brothers v. Furtado* (10), *Weiss Biheller and Brooks v. Farmer* (11). In all of these cases which concern dealing in commodities, the trading the profits of which it was proposed to tax was the purchase or sale of a finished article or of an article which was not transformed by manufacture within the taxing realm while in the hands of the person whom it was proposed to tax. Messrs. Steels however go much further. As stated in paragraph 7 of the Statement of Facts, the vast bulk of the rice, timber, cotton, oil-cake, etc., which Messrs. Steels exported during the accounting period now in question was produce which had been submitted to some process of manufacture in British India by Messrs. Steels before export. The claim of Messrs. Steels is that none of the profits which arise, for instance, from the export and sale out of British India of teak extracted from Burma forests and converted in Burma to a form marketable in Europe is liable to Indian income-tax.

3. I think that there are two general questions of law which it is necessary to decide before each of the questions referred can be properly decided. These two principal questions of law are:—

(a) whether a person who makes profits by buying or extracting produce in British India, transforming or working it up by mechanical process in British India and exporting and selling it outside of British India is liable to pay Indian income-tax on such profits, and

(b) whether certain classes of income derived by a non-resident from a business connection in British India are made liable to Indian income-tax by the provisions of section 42, sub-section (1) of the Indian Income-tax Act, XI of 1922.

4. In connection with both these general questions it is pertinent to observe that the definition of "trade" in section 237 of the United Kingdom Income-tax Act of 1918 is practically the same as the definition of "business" in section 2, sub-section (4) of the Indian Income-tax Act, XI of 1922.

5. In Murray's New English Dictionary, to "manufacture" is defined as "to work up (material) into forms suitable for use." In Annandale's Concise English Dictionary, "manufacture" is defined as "the operation of reducing raw materials into a form suitable for use by more or less complicated processes." In Chamber's Twentieth Century Dictionary to "manufacture" is defined as "to make from raw materials by any means into a form suitable for use." According to these definitions it appears to me to be self-evident that Messrs. Steels' operations in the milling of rice, in the extraction and conversion of timber, in the ginning of raw cotton and the pressing of oil-seeds all amount to "manufacture."

6. As regards the former of the two principal questions to be decided, namely, whether profits derived from the sale outside of British India of commodities converted or worked up in British India are liable to Indian income-tax, I can find no legal authority whatever to support the view that the profits in question are not taxable. The profits concerned arise from activities which include manufacture in British India. Accordingly under the definition in section 2, sub-section (4) of the Indian Income-tax Act Messrs. Steels' activities in British India in connection with the produce from which the profits in question arise amount to carrying on business. All the profits arising therefrom appear to be liable to Indian income-tax under the provisions of section 4, sub-section (1) and sections 6 and 10.

7. The law on the subject is clearly set forth in the Calcutta ruling *Rogers Pyatt Shellac Company v. The Secretary of State for India in Council* (12) by Mr. Justice Chatterjee at the end of his judgment:

"So far as the factory at Wyndhamgunj is concerned it clearly comes within the Act. Admittedly there is a manufacturing branch of the Company at that

(8) L. R. 20 Q. B. D. 753; 2 Tax Cas. 402.

(9) (1896) A. C. 31; 3 Tax Cas. 407.

(10) 5 Tax Cas. 602.

(11) (1918) 2 K. B. 725; (1923) 1 K. B. 226; 8 Tax Cas. 381.

(12) 1 I. T. C. 363; 52 Cal. 1.

place, and under section 2, clause (3) of Act VII of 1918 'business' includes among other things any 'manufacture'. The income therefore from such manufacture would be income from 'business' and as such taxable under sections 3 and 5 of the Act."

In this respect there is no difference between Act VII of 1918 to which Mr. Justice Chatterjee refers and the present Act XI of 1922. The case quoted *Rogers Pyatt Shellac Company v. The Secretary of State* is the only Indian case I can find dealing directly with the question under examination. The same question arose in a Madras case, *Commissioner of Income-tax v. North Ananthapur Gold Mines* (13). In this case a Gold Mining Company which had its registered office in London earned profits from the sale in Great Britain of gold mined in the Ananthapur District in the Madras Presidency. The Company contended that as the sale of gold took place entirely in Great Britain its profits did not arise and accrue in India. The Madras High Court in refusing to issue a *mandamus* requiring the Commissioner of Income-tax to state a case incidentally expressed the opinion that having regard to the language of the Act the assessment was validly imposed. The relevant passage is at page 136 of 1 I. T. C., where Wallis, C. J. is reported as stating "As regards this particular case, I will only say that while the Commissioner has rightly based his decision on the language of the Indian section which differs materially from the corresponding section of the English Act, etc."

It is to be noted that this question, *i. e.*, the first of the two general questions set out in paragraph 3 above, did not arise at all in the *Madras Export Company's* case.

8. I can find no relevant English ruling. So far as I can ascertain it has never been contended that a company carrying on manufacture in the United Kingdom is not liable to English income-tax on its profits. No process of manufacture was concerned in any of the relevant English cases. In *Sulley v. Attorney-General* the firm which it was sought to tax purchased piece-goods in England and sold them in America. In *Werle and Co. v. Colquhoun* and *Tischler v. Apthorpe* and also in *Grainger v. Gough* (14), the business concerned was the sale of French champagne in England. In *Crookston Brothers v. Furtado*, the business was the importation of phosphates from Algeria. In *Erichsen v. Last*, the business concerned was the despatch of foreign cablegrams from the United Kingdom. In *Weiss Biheller and Brooks v. Farmer*, the business consisted in the sale in the United Kingdom of gas mantles imported from Holland.

9. There is however a Colonial case decided by the Judicial Committee of the Privy Council which appears to apply directly to the question at present under examination. The case is *Commissioners of Taxation v. Kirk* (15). In this case the assessee was a Company registered in the Colony of Victoria and managed by a Board of Directors with Headquarters at Melbourne in Victoria. The Company carried on the business of mining in the Colony of New South Wales. The ore obtained in New South Wales was treated in that Colony but the merchantable product was sold outside the Colony of New South Wales. The Income-tax authorities in New South Wales sought to tax the Company on the whole of its profits. In the judgment the operations of the Company are divided into four parts :—(1) the getting of the ore ; (2) the refining of the ore ; (3) the sale ; (4) the receipt of the money.

Of these four processes only the first two took place in New South Wales. In the judgment it is laid down as follows with regard to the four processes mentioned :—

"All these processes are necessary stages which terminate in money and the income is the money resulting less the expenses attendant on all the stages."

(13) 1 I. T. C. 133; 44 Mad. 718.

(14) (1896) A. C. 325; 3 Tax Cas. 462.

The Judicial Committee held that as the profits of the first two stages arose or accrued in New South Wales it necessarily followed that the Company was liable on the whole of their profits.

10. The whole judgment of the Judicial Committee in this case supports the finding in the *Rogers Pyatt Shellac Company's* case. This ruling also points to the conclusion that the profits we are considering, namely, profits derived from the sale outside of British India of produce extracted and worked up in British India are liable to Indian Income-tax.

11. In applying the finding in the case *Commissioners of Taxation v. Kirk* to an Indian case it is necessary to consider whether there is any difference between the relevant sections in the Indian Income-tax Act and the sections in the New South Wales taxing statute. The relevant sections of the latter Act are quoted in the judgment cited. It is clear from the judgment that the words "earned," "derived" and "arising and accruing" are used interchangeably throughout. Under the New South Wales law tax was payable on the annual amount of all incomes—

"(1) arising or accruing to any person wheresoever residing in New South Wales from any profession or business carried on in New South Wales....."

There is a provision in section 27 however to the effect that—

"(3) No tax shall be payable in respect of income earned outside the Colony of New South Wales."

The net effect of these provisions appears to me to be exactly the same as the net effect of the relevant section of the Indian Income-tax Act. The Indian Act makes taxable profits arising or accruing in British India or deemed to arise or accrue in British India. The New South Wales Act makes taxable profits arising and accruing from business carried on in New South Wales. There is so far no local limitation as regards arising or accruing. But the clause which exempts income earned outside New South Wales has, in view of the fact that "earned" and "derived" and "arising and accruing" are treated as being interchangeable, the effect of making the law the same as the Indian Law.

12. On the above view, both on the authority of the Calcutta High Court in the *Rogers Pyatt Shellac Company* case and on that of the Judicial Committee in the case, *Commissioners of Taxation v. Kirk*, there is ground for holding that if any part of the process of arising or accruing takes place in British India the whole of the profits are liable to Indian income-tax. An alternative view, for which I can find no legal authority whatever, is that the total profits in question can be divided up into two portions :—

(a) a portion arising and accruing in British India ;

(b) a portion arising and accruing outside of British India.

There is no means of making such a division. The only actual profits are constituted by the money received by Messrs. Steels in London less the expenses incurred at all stages of the transactions involved. But if it were theoretically possible to divide the profits into two parts as above, the part (a) would on the authority of the *Rogers Pyatt Shellac Company* case and the *Commissioners of Taxation v. Kirk* case be liable to Indian income-tax. The second portion would, it is submitted, be income derived by a non-resident from a business connection in British India and would, as is claimed below, also be liable to Indian income-tax.

13. I turn now to examine the second principal question of law, namely, whether profits derived directly or indirectly from a business connection in British India are made liable to Indian income-tax by the provisions of section 42 (1) of the Indian Income-tax Act, 1922.

On this point there are two conflicting Indian rulings. In 1922 in the *Madras Export Company* case, the Madras High Court held that section 42 (1)

is a machinery section and that it does not make liable to Indian income-tax any income which would not be otherwise chargeable. In March 1924 the Calcutta High Court in the case *Rogers Pyatt Shellac Company v. Secretary of State* dissented from the view taken by the Madras High Court and held that section 42 (1) is a charging section. These are the two principal rulings. But there are references in other Indian cases which throw light on the questions at issue.

14. The questions at issue have been so thoroughly examined and the findings so clearly set forth by the Hon'ble Judges of the Calcutta High Court that it is unnecessary for me to do more than shortly recapitulate the main points decided. As pointed out by Mr. Justice Mookerjee with reference to the *Madras Export Company* case, "the learned Judges in that case proceeded upon the supposition that the Legislature intended no change from the earlier Statutes which to a large extent were modelled on the English Statutes. That there is now a substantial difference is clear, and has been recognised in the cases, amongst others, of *Board of Revenue v. Ramanathan Chetty* (1), *In Re, Aurangabad Mills* (2) and *In Re, John and Co* (3)."

Under the United Kingdom law a person is liable to United Kingdom income-tax who exercises a trade in the United Kingdom. In the English cases concerned which have been enumerated in section 2 above, the Judges have divided up the kind of trading concerned which, as has been pointed above, practically invariably consists in the purchase or sale of a completely finished article, into three constituent parts:—(a) the making of the contract; (b) the delivery of the goods; (c) the payment for those goods.

The Judges have decided the English cases according to the locality in which one or other of the three constituent parts of trading has taken place. The provisions of the Indian Income-tax Act as has been pointed out are entirely different. Section 4 (1) of Act XI of 1922 expressly lays down that the Act not only applies to (a) income accruing or arising or received in British India, but also to (b) income deemed under the provisions of this Act to accrue or arise or to be received in British India. Section 42 (1) enacts that in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection or property in British India shall be deemed to be income accruing or arising within British India. The sorts of income described in section 42 (1) are deemed to accrue or arise or be received in British India and therefore as laid down in section 4 (1) the provisions of the Act apply to them and they are liable to Indian income-tax.

15. The scheme of the Indian Act appears to me to be as follows. The principal charging section is section 4 (1). This I think is made more clear from the fact that the principal exempting section is section 4 (3). Section 4 (1) and also section 4 (2) create a liability to income-tax. In section 6 income, profit, or gains which, under the provisions of section 4 (1) or 4 (2), are liable to tax, are divided into heads. Sections 7 to 12 lay down the method in which the chargeability to tax is to be applied to the heads into which income liable to tax is divided by section 6. Sections 6 to 12 may be described as secondarily or derivatively charging sections. They prescribe the manner in which the chargeability to tax which is created by section 4 (1) or 4 (2) is to be applied to the several heads into which income liable to tax has been divided for the purposes of assessment.

It appears to me that the fundamental fallacy underlying the decision of the Hon'ble Judges of the Madras High Court is that they have treated section 5 of Act VII of 1918 (which corresponds with section 6 of Act XI of 1922) as being the principal charging section. It is clear from various passages in the printed judgments that the Hon'ble Judges regarded section 5 as being the principal charging

(1) 1 I. T. C. 37; 43 Mad. 75.

(2) 1 I. T. C. 116; 45 Bom. 1286.

(3) 1 I. T. C. 61; 43 All. 139.

section. Thus in the headnote it is stated—"It (Section 31 of the Income-tax Act, 1918) is not a section designed to declare some other gains taxable beyond what has been declared by section 5 of the Act to be taxable." Lower down in the headnote we find "Section 33 (1) of the Income-tax Act was not intended in any way to enlarge the scope of section 5." Sir Walter Schwabe, C. J., states (I. L. R. 46 Mad. page 363, line 1), "by section 5 which is the charging section." Lower down (page 364, line 8) he says "the words are in my view most unsuitable if intended to have a wider meaning than the well known meaning of the words in the charging section 5 (4)....." Mr. Justice Wallace (page 368, line 7) states—"The charging section of the Act is section 5.....," and lower down (at page 368, line 28) he states, "Section 33 (1) is not designed or situated in the Act as a charging section in addition to section 5." On page 369, line 7, it is stated that "It is not a charging section designed to declare some other gains taxable beyond what has been declared by section 5 to be taxable."

16. This view that section 5 of Act VII of 1918 (corresponding to section 6 of Act XI of 1922) is the principal charging section is quite at variance with previous opinions given by the Hon'ble Judges of the Madras High Court and also with the stated opinions of other High Courts in India. Thus the whole scheme of Act VII of 1918, which is the same as the scheme of Act XI of 1922, is properly set forth by Mr. Justice Seshagiri Aiyar in his judgment at page 89 of I. L. R. 43 Madras. Again in the case, *Chief Commissioner of Income-tax v. Bhamjee Ramjee* (1) the Hon'ble Judges correctly treat section 3 of Act VII of 1918 (corresponding to section 4 of Act XI of 1922) as being the principal charging section. I quote the beginning of the opinion of the Madras High Court Bench in that case :—

"Now the income which is taxable under the Act is, as provided in section 3 (1), 'all income from whatever source it is derived if it accrues or arises or is received in British India or is under the provisions of this Act, deemed to accrue or arise or to be received in British India,' and under section 33 (1), in the case of any person residing out of British India, 'all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connexion in British India shall be deemed to be income accruing or arising in British India,' and is consequently taxable under the express provisions of section 3."

Again in the case, *In Re, The Aurangabad Mills* (2), Mr. Justice Macleod states, "The important section is section 3, sub-section (1) of the Act (VII of 1918). 'Save as hereinafter provided, this Act shall apply to all income from whatever source it is derived, if it accrues or arises or is received in British India, or is, under the provisions of this Act, deemed to accrue or arise or to be received in British India.'"

17. There are other fallacies involved in the *Madras Export Company* case. The Madras High Court held that section 42 (1) only applied to profits received in British India by the agent of a non-resident. But if this were so why does section 42 (1) say that "profits.....from a business connection in British India" shall be deemed to accrue or arise in British India." It is impossible to make sense of section 42 (1) on the view that it is a machinery section.

18. For the reasons stated in the preceding paragraphs it appears to me that section 42 (1) of Act XI of 1922 coupled with section 4 (1) has the effect of making liable to Indian income-tax profits or gains accruing or arising to a non-resident whether directly or indirectly through or from a business connection in British India.

19. In paragraph 8 above I set forth the conclusion arrived at as regards the first general question of law stated in paragraph 3 above, namely, that a person who makes profits from exporting produce manufactured in British India is liable to pay income-tax thereon. In the immediately preceding paragraph I have come to the

(1) 1 I. T. C. 147; 44 Mad. 773.

(2) 1 I. T. C. 116; 45 Bom. 1286 at 1289.

conclusion that income derived by a non-resident from a business connection in British India is also liable to Indian income-tax. I now proceed to examine the seven referred questions by the light of the above conclusions.

20. With regard to the question as to whether the whole or part of the sum of £68,218-14-11 described as "London profits on Rice" is liable to Indian taxation it appears to me that

(a) One constituent portion £54,575 being profits arising from transactions in produce which has undergone some process of manufacture in Messrs. Steels' hands in Burma is liable to Indian income-tax under the provisions of section 4 (1) and sections 6 and 10 of the Indian Income-tax Act XI of 1922. Messrs. Steels carry on manufacture in Burma in respect of this produce and accordingly under the definition in section 2, sub-section (4), they are carrying on business and liable to income-tax in respect of these profits under section 10.

(b) With regard to the other constituent portion of the total sum concerned in the first question referred, namely, £13,645-14-11 being profits on produce purchased in Burma and exported in the same form, in my opinion these profits are liable to Indian income-tax under the provisions of section 4 (1) and 42 (1) of the Indian Income-tax Act. For Messrs. Steels are by admission non-resident in British India. Their position with regard to the transactions concerned is exactly the same as that of the *Rogers Pyatt Shellac Company* in the corresponding transactions in the Calcutta case. Accordingly following that decision the profits in question are profits derived from a business connection in British India and are liable to Indian income-tax.

21. With regard to the second question the two constituent items into which the profits have been divided appear to me to be exactly on all fours with the corresponding portions of the profits dealt with in question (1) and call for no further remark. The whole of these profits also is liable to Indian income-tax for the reasons given in the preceding paragraph.

22. It may be possible to differentiate Messrs. Steels' profits from the rice, timber and cotton and produce purchased by them in India and exported in the same form from the profits that were at issue in the English decided cases which have been quoted. So far as I can ascertain in all the English cases in which the profits concerned were derived from transactions in merchandise, these transactions were the only business done in the United Kingdom by the firm which it was sought to assess to income-tax. As has been shown this is not the case with Messrs. Steels. They carry on, in addition to the class of business now under examination, business to a very large extent both entirely within British India and also in exporting produce manufactured by them in British India. The same staff deals with all these classes of business. The "purchase-export" business is merely part of a larger business the profits and gains of the other parts of which are liable to income-tax. The whole of Messrs. Steels' business in Burma is a venture in the nature of commerce. It may be questioned if it is legitimate to isolate one particular type of business and hold that they are not "carrying on business" in respect of that type of business. Furthermore Messrs. Steels themselves lease forests and own rice-mills, cotton-mills, saw-mills and maintain a large staff to operate these. It is a legitimate presumption that they want to make all the profits possible. On this view their purchases of manufactured commodities would be made merely to supplement the available stocks of their own manufacture. On this view the "purchase-export" business would be merely ancillary to their other business. I suggest that the profits at present under reference can be differentiated for the above reasons from the profits in the English cases quoted.

23. With regard to the item £6,816-18-8 approximately, described as "London profits on Cotton and Produce," it has been stated above that this sum really represents a commission of 2 1/2 per cent. on the value of the cotton and produce

sold in London. I cannot see that there is any case for exempting from Indian income-tax this sum as it stands at present. The sum in question is part of Messrs. Steels' profits. There is in my opinion no provision of law enabling Messrs. Steels to charge themselves a commission for doing their own business and then to claim that such commission should be allowed as a deduction from their profits for purposes of income-tax. The sum in question is in my opinion clearly liable to Indian income-tax. Messrs. Steels claim that the profits in question are not liable to income-tax on the ground that the profits are shown as accruing in London. The method of book-keeping adopted by Messrs. Steels, however, has nothing to do with the question of liability to income-tax. In my opinion the whole of the profits of the Cotton and Produce Department whether shown in Messrs. Steels' books as accruing in London or in Rangoon should be treated as a whole and divided into two portions in the same manner as the profits of the Rice Department and of the Timber Department, one portion representing profits on produce manufactured in India and the other portion profits on merchandise exported from India in the same form as when purchased by Messrs. Steels. The liability or otherwise to Indian income-tax of the profits of this Department would then have to be decided on the same lines as laid down in paragraph 20 above.

24. With regard to the fourth question referred, regarding the sums described as "Profits on Insurance in London" in my opinion the whole of these profits are liable to Indian income-tax either on the ground that the insurances in question are part of Messrs. Steels' business in rice and that as the expenses of insurance are included as a charge against the profits, so any incidental profits made by Messrs. Steels out of the same transactions in insurance should be added back to the profits. Alternatively the profits in question are profits derived from a business connection in British India and are taxable under section 42 (1).

25. As regards the fifth question referred, the relations subsisting between Messrs. Steels and the Indo-Burma Petroleum Company, Limited, and the Attock Oil Company, Limited, have been fully set forth in the Statement of Facts. Messrs. Steels' connection with the Indo-Burma Petroleum Company, Limited, is not that of ordinary shareholders. Rather it is the case that Messrs. Steels carry on an oil business and that their method of doing so is through the medium of the Indo-Burma Petroleum Company, Limited. The relations between Messrs. Steels and the Indo-Burma Petroleum Company, Limited, as set out in paragraph 18 of the Statement of Facts, and in particular the fact that the Managing Agency of this Company is reserved to Messrs. Steels by the Articles of Association appear to me to be sufficient proof of this. The profits now under question whether "Commission on Sales in the United Kingdom" or "Commission on Stores exported from London" are in my opinion profits arising from a business connection in British India. In his judgment in the *Rogers Pyatt Shellac Company* case Mr. Justice Mookerjee interpreted the words "Profits.....arising from a business connection in British India" as including income "which is attributable to the connection (a person) has with a business in British India." On this view the profits in question are liable to Indian income-tax.

26. The profits concerned in the sixth question referred are in my opinion exactly on all fours with those in the fifth question referred and are liable to Indian income-tax for precisely the same reasons.

27. The profits concerned in the last question referred, namely, "London Commission on Stores shipped £7,199" appear to me to be part of Messrs. Steels' general profits from business. This profit has been separated off only because of the particular method of book-keeping followed by Messrs. Steels. But the fact that Messrs. Steels follow a particular method of book-keeping does not affect the liability of the profits in question to income-tax. I cannot see that there is any sanction for Messrs. Steels charging themselves a commission for work done for themselves and

then claiming to deduct the amount of this commission from their profits. In my opinion the profits in question should be added to Messrs. Steels' general profits which are taxable as income derived from business.

McDonnell, for the assesseees.

Higinbotham, with *Keith*, for the Crown.

JUDGMENT.

This is a reference made by the Commissioner of Income-tax on his motion under section 66 (1) of the Income-tax Act, 1922.

The facts and the questions referred are clearly stated by the Commissioner of Income-tax in his reference.

The assessee is a limited Company registered in London under the English Companies' Act. Its headquarters are in London and, admittedly, it is a non-resident of British India. For many years the firm has carried on large business operations in Burma, especially in connection with rice, timber and cotton.

It was stated in Court that for some time the firm was assessed on a certain percentage of its net profits by consent and without prejudice to the strict legal liability, but the Income-tax authorities considered that this percentage was not high enough. The Company contends that none of its profits which form the subject of reference are assessable to income-tax in British India. The Commissioner of Income-tax, on the other hand, considers that all the heads of profit mentioned in his reference are assessable.

The question raised is one of very great legal and practical importance, and it has been very fully and ably argued before us for three days.

A great many cases have been cited before us, both English and Indian, but it will be only necessary, for the reasons hereinafter given, to refer to a few of these.

The assessment was made under the provisions of section 4 (1), read with section 42 (1), of the Indian Income-tax Act, 1922. The provisions of section 4 (1) run as follows :—

"Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India."

On reference to section 6, the only head therein applicable seems to be the fourth—"Business." In the definition section—section 2 (4)—"Business includes any trade, commerce, or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture."

The firm admittedly has various rice mills, saw mills, cotton ginning mills and vegetable oil mills in the Province, whereby commodities or raw material are "worked up into forms suitable for use." (New Oxford Dictionary). It consequently manufactures and so carries on business within the Province. Any income, profits or gains arising from such business seem to be chargeable under sections 4 (1) and 6 of the Act of 1922.

For the assessee it is contended that no income, profit or gain accrues or arises in respect of the bulk of its rice, timber and cotton business, because these goods are shipped to the head office in London, where they are sold on the English market and the payment is received in London and not remitted to India, and that a profit or gain cannot be said to accrue or arise until the goods are sold and the money is received.

This contention was put forward in the case of *Commissioners of Taxation v. Kirk* (1), but was overruled by their Lordships of the Privy Council in the judgment of Lord Davey.

Under the New South Wales Land and Income-tax Assessment Act of 1895, section 15, income-tax was payable in respect of the annual amount of all income :—

“(i) Arising or accruing to any person wheresoever residing from any , trade, carried on in New South Wales. ;

(iii) Derived from lands of the Crown held under lease. ;

(iv) Arising or accruing to any person wheresoever residing. , from any other source whatsoever in New South Wales not included in the preceding sub-sections.”

The Company was registered in Victoria and had its head office and Board of Directors at Melbourne. It had mines in New South Wales, where the crude ore was smelted. None of the ore was sold in New South Wales, sales being made for the most part in Melbourne, and the money received for the ore either in London or Melbourne.

Their Lordships held that, whether or not the Company traded in New South Wales, so as to come within sub-section (1), if there was income, it was clearly income from lands of the Crown held on lease, and so came under sub-section (3), and also was income from some other source in New South Wales, and so came under sub-section (4).

As to whether there was income : “It appears to their Lordships that there are four processes in the earning or production of this income :—(i) the extraction of the ore from the soil ; (ii) the conversion of the crude ore into a merchantable product, which is a manufacturing process ; (iii) the sale of the merchantable product ; (iv) the receipt of the moneys arising from the sale. All these processes are necessary stages which terminate in money, and the income is the money resulting less the expenses attendant on all the stages. The first process seems to their Lordships clearly within sub-section (3), and the second or manufacturing process, if not within the meaning of ‘trade’ in sub-section (1), is certainly included in the words ‘any other source whatsoever’ in sub-section (4).

So far as relates to these two processes, therefore, their Lordships think that the income was earned and arising and accruing in New South Wales.”

As the Commissioner of Income-tax, in his opinion attached to the reference, seems to have fallen into an error on this point, it is well to remember that their Lordships did not decide that the whole of the profits of the Company were chargeable. They merely answered the first question stated in the special case in the affirmative, and that question was whether the Companies had *any* income in 1897 within the meaning of the Act.

Applying that case to the present, it seems clear that, in determining whether any income, profits or gains arise or accrue, we must not be content to look only at the last stage of the accrual, but must take into consideration the previous stages as well.

The main battle-ground, however, in this case has been over the provisions of section 42 (1).

For the assessee it is contended that the section is not a charging section at all, but merely a machinery section, that is, in the words of Lord Sterndale, a section which provides a method of carrying out the charge imposed by some other section ; that it is embedded amongst a number of other provisions clearly of that character ; that, if it is taken as a charging section, it is so wide and far-reaching in its terms and so manifestly unjust in its application to non-residents, that it could not have been so intended by the legislature ; and that a fiscal burden can only be imposed upon the subject by clear and unmistakable language.

Reliance is placed on the case of *Greenwood v. Smidth* (1), in its various stages in the English Courts, which has been followed by a Bench of the Madras

(1) (1920) 3 K. B. 275 ; (1921) 3 K. B. 583 ; (1922) 1 A. C. 417 ; 8 Tax Cas. 193.

High Court in the case of *The Secretary, Board of Revenue (Income-tax) v. Madras Export Company* (1). The English Courts were construing section 31 of the Finance Act (II of 1915); and if the Act which we are construing was, in its provisions, identical with, or similar to, the English Finance Act (II of 1915), the decisions of the several eminent Judges, though not binding on us, would naturally carry the greatest weight and authority. But a comparison of the two Acts shows that not merely in arrangement, but also in substantive provisions, the Acts are, in many respects, dissimilar.

To take one point of difference indicated by Chatterjee, J. in *Rogers Pyatt Shellac Company v. Secretary of State for India* (2): "It will be seen that under the English Acts, it is essential that the profits should arise from the *exercise of the trade within the United Kingdom*. In the Indian Acts (VII of 1918 and XI of 1922), however, in the case of any person residing out of British India all profits or gains accruing or arising to such person whether directly or indirectly through or from any business connection in British India shall be deemed to be income accruing or arising within British India. There is no such provision in the English Acts, and that distinguishes the English Acts and the cases decided thereunder from the Indian Acts."

With regard to non-residents, the only question in the English Acts is whether there is a trade exercised in the United Kingdom. This, as we have seen, is not the case under the Indian Acts.

We may here state that, though the Madras decision already quoted, was under the Indian Income-tax Act of 1918, for the purposes of the question before us that Act does not differ from the Act of 1922, with which we are dealing.

A significant point is that the words "or deemed under the provisions of this Act to accrue, or arise, or to be received in British India" in section 4 (1), and the analogous words in section 4 (2), do not appear anywhere else in the Act except in section 42 (1).

That being so, it is, in our opinion, necessary to read both sections together to arrive at the meaning of the legislature. In other words, it is necessary to look to section 42 (1) to find out, in the case of a non-resident, what income, profits or gains are "deemed to accrue, or arise, or to be received in British India" under the provisions of the Act; and, from section 42 (1), we find that all profits or gains accruing or arising to a non-resident, whether directly or indirectly, through or from any business connection or property in British India is deemed to be such income, and is, therefore, chargeable under sections 4 (1) and 6.

This is the view taken by a Bench of the Calcutta High Court in *Rogers Pyatt Shellac Company v. Secretary of State for India* (2), and we find ourselves in general agreement with the judgment of Mr. Justice Chatterjee, with which Mr. Justice Chotzner agreed, and with the conclusions of which Mr. Justice Mukerji was in complete agreement.

We admit the difficulty arising from the vague expression "from any business connection." Taken in its wide sense, it would render liable to Indian income-tax any profits made by a manufacturer in England on a single consignment of goods to an importer in India. This is the meaning which the Commissioner of Income-tax seems to have attached to the phrase, and is the meaning which the learned Government Advocate contends, is the correct one. It is one, however, which we cannot adopt, as such a meaning would be repugnant to the word "business" in section 6, as defined by section 2 (4), and we can assign no wider meaning to it than the latter words of the definition as "any adventure or concern in the nature of trade, commerce or manufacture." It was probably used, as Mr. Justice Chatterjee conjectures, as a compendious expression to cover such concerns in the

(1) 1 I. T. C. 194; 46 Mad. 360.

(2) 1 I. T. C. 363; 52 Cal. 1.

nature of trade, commerce, or manufacture as arise through a branch, factoring, agency, receivership or management. But be this as it may, its meaning, in our opinion, must be strictly confined to the meaning of the word "business" in section 6.

Applying the foregoing conclusions to the questions of reference, we would answer the first and second questions referred as follows :—

Under the authority of *Commissioners of Taxation v. Kirk* (1), we hold that the fact of the produce being sold in London and the money being received there does not prevent profits or gains accruing, or arising, or being deemed to accrue or arise in British India from being taxable under the Indian Income-tax Act.

We are also of opinion that no distinction, so far as liability to income-tax is concerned, can be drawn between profits on produce, which has undergone some process of conversion or "working up" by the assessee in Burma, and profits on produce purchased by the assessee in Burma and exported in the same form as when purchased.

But a serious practical question arises as to whether all the net profits are liable to income-tax. As we have already seen, their Lordships of the Privy Council did not so decide in the case of *Commissioners of Taxation v. Kirk* (1). At page 42, Mr. Justice Mukerji, in the Full Bench case of *Rogers Pyatt Shellac Company v. Secretary of State for India* (2), seems to indicate that the calculation of what part of the net profits are to be deemed to arise and accrue in India and what part at the place of disposal and realization may have to be made.

No doubt, in calculating the net profits, due deductions had already been made in respect of the cost of the Home establishment; but this, in our opinion, is not sufficient.

If the assessee had not had a Head Office in London and wished to ship and dispose of its produce in the English market, it could only do so, for ordinary practical purposes, by means of commission agents there, and a reasonable remuneration to such commission agents would have to be deducted before arriving at the net profits earned. But, if the Head Office in London and the various branches controlled by the Head Office in Rangoon happen to be one and the same firm, it does not, in our opinion, affect the question. And in arriving at the amount of profits liable to Indian income-tax, the Commissioner of Income-tax, in our opinion, should allow a reasonable commission agents' commission on the sale and realization of the produce. So much of the profits as can reasonably be attributed to commission agents' commission should not be assessable to income-tax in Burma.

With regard to question No. 3 in paragraph 11 of the reference, the Commissioner refers to the same as being claimed as a commission of 2 1/2 per cent. of the sale proceeds received for cotton and produce sold by the London Managers out of British India in consideration for the work done at the London end. It is not clear to us whether the claim is considered as a reasonable commission agents' commission. If it is, in accordance with our answer to the previous questions, this sum should not be assessed. If it is not a reasonable commission, so much of it as would represent a reasonable commission ought to be deducted and the balance assessed to income-tax.

With regard to question No. 4: These profits seem to have arisen on contracts of insurance entered into by the Head Office on rice consigned to it by its Rangoon branch. Admittedly, the Burma branch or agency had nothing to do with them. The profits were not merely earned in England, but the contract was entered into in England.

(1) (1900) A. C. 588.

(2) 1 I. T. C. 363; 52 Cal. 1.

That the policies were effected on produce coming from Burma is much too remote a connection to justify us in holding that the profits could be deemed to arise or accrue in British India, bearing in mind the circumscribed meaning to be attached to the expression "business connection."

With regard to question No. 5: The items there referred to belong to two quite distinct categories. The sum of £.2,608|12|5 is described as commission earned by Steel Brothers' Export Department in London on stores, etc., purchased and shipped from the United Kingdom to Burma for account of the Indo-Burma Petroleum Company. As regards this item, our answer is the same as our answer to question No. 4.

As regards the item of £. 1,058|16|6 which is described as commission earned by the Oil Department, London, on sale of wax, etc., in the United Kingdom for account of the Indo-Burma Petroleum Company, our answer is the same as our answer to question No. 3.

With regard to question No. 6: The last two items of £.740|0|5 and £.1,239|19|2 are, in our opinion, not liable to income-tax in Burma. The first item of £.6,374|13|7 is described as an allowance from the Attock Oil Company, Limited, to cover administration expenses as Managing Agents as per agreement dated the 14th November, 1921. So much of this sum as represents profits on management in British India is assessable to Indian income-tax. There are not sufficient data before us to answer this question with regard to this item more specifically.

With regard to question No. 7: The reference does not specify what part of the item arises from commission on stores not for sale, such as mill plant and accessories, and what, if any, arises from goods for sale, such as piece-goods. As we have already indicated, the Head Office in London are entitled to charge a reasonable commission on all goods shipped to their branch in Burma. Unless the commission charged is unreasonable, it is not assessable to income-tax in Burma.

On our finding, as neither party has wholly succeeded in its contention, we make no order as to costs.

[138] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coultts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

.. [28th September, 1925.]

A.V.P.M.R.M. Murugappa Chettiar

...

Assessee*.

v.

The Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Sec. 10—Remittance to headquarters in British India from foreign branch—Presumption, if capital or profits—Assessability.

Money remitted to the headquarters of a firm in British India from its branch outside British India is *prima facie* to be presumed as having come out of profits rather than a remittance of capital and is assessable to income-tax as profits, until the contrary is shown by the assessee.

Scottish Provident Institution v. Allan, (1903) A. C. 129; Followed.

Application under section 45 of the Specific Relief Act, 1 of 1877 and section 66 of the Income-tax Act, XI of 1922, for an order requiring the Commissioner of Income-tax, Madras, to refer to the High Court the question of law arising in the matter of assessing the petitioner to income-tax.

* (1926) I. L. R. 49 Mad. 465; 51 M. L. J. 138; 24 L. W. 343; (1926) M. W. N. 622; A. L. R. (1926) Mad. 767.

M. Subbaraya Aiyar, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The difficulty in this case has entirely arisen owing to the ambiguity in the language used by the Commissioner in passing his order on the petition. The second paragraph of his order was on the face of it capable of the construction that he had held in the circumstances of this case that where a sum of money passed from a foreign business to the headquarters of the firm in British India, it must be regarded as profits and that no evidence was admissible to show that in fact it was something else. We are satisfied that the Commissioner did not mean to say that, but merely meant to say that he thought that where money was remitted from abroad to the headquarters in British India, the natural inference would be that such remittances came out of profits rather than capital until the contrary was shown by the assessee. The claim here was that a large portion of the amount remitted from Siranda to Karaikudi was a repayment of capital lent long years before, or at any rate was profits outside the three years' limit which would not under the law be assessable in British India. The Commissioner heard this contention and was not satisfied that the assessee had made out his case and he was entitled to take that view. That the onus of proof rested upon the assessee appears to be amply borne out by the case of *Scottish Provident Institution v. Allan* (1). That was a case of a Scottish Insurance Company, with branches in Australia, and in dealing with the question whether remittances from Australia to the head office in Scotland were assessable to income-tax, Lord Halsbury uses the following language:—

"The next question is whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting those two items together, they must include and obviously do include a large amount of profits. It is for the company to show, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was, in truth, capital and not profit at all..."

The presumption that the Commissioner made in this case, viz., that *prima facie* all remittances were to be regarded as profits and that the burden of proof was cast upon the assessee to show the contrary, seems to be amply warranted by the authority of that case. As the Commissioner did not misdirect himself the only questions that remain are purely questions of fact and so long as he has approached them without any misconception in his mind as to how they should be dealt with, his findings are conclusive.

The application will be dismissed with costs, Rs. 150.

[139] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt.: Chief Justice and Mr. Justice Foster.

[22nd October, 1925.]

Hukmi Chand Hardat Rai

...

Assessee.

v.

The Commissioner of Income-tax, Behar and Orissa ... *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 66 (2) and (3)—Application to Commissioner for stating a case—Application more than a month after order under Sec. 31—Rejection by Commissioner—Application to High Court under Sec. 66 (3)—If lies.

Where an application by an assessee under section 66 (2) of the Income-tax Act, to the Commissioner of Income-tax for a reference to the High Court, made more than a month after the passing of the order under section 31, was rejected on the ground that no question of law arose and on an application under section 66 (3), the High Court without their attention being drawn to the dates in the case, directed the Commissioner to state a case.

Held, on a preliminary objection to the hearing of the reference, that the assessee was not entitled to apply to the High Court under section 66 (3) of the Act and the assessment must therefore be confirmed.

Case stated under section 66 (3) of the Income-tax Act, XI of 1922 by the Commissioner of Income-tax, Behar and Orissa, in compliance with the order of the High Court, dated 15th January, 1925.

CASE.

The copy of the High Court's order sent to me is as follows :—

"15th January, 1925. The Commissioner of Income-tax is called upon to refer the case to this Court on the question whether the notice calling upon for accounts under section 22 of the Act was sufficient notice to comply with the terms of sub-section (2) of section 23. This point is covered by the 11th question which is mentioned in the judgment of the learned Commissioner of Income-tax."

The copy is apparently incorrect, but the meaning is clear on reference to the 11th question which the assessee in his review application asked me to refer to the High Court, namely, the competency of the Income-tax Officer and the Assistant Commissioner of Income-tax to disallow several items of expenditure without a requisition specifying points under section 23 (2) of the Act.

2. The facts are as follows:—

A notice was issued on April 18, 1923, on the assessee under section 22 (2) of the Indian Income-tax Act calling for a return of income within 30 days. No return was filed in that time and assessment was taken up on November 11, 1923, when a notice under section 22 (4) was issued calling on the assessee to appear on November 17, "with complete accounts for last two years for businesses in all places with invoices (*Bijaks*), vouchers and stock-books." On November 17, the assessee put in an appearance and filed a return which only showed "Loss in Ranchi and Calcutta, profit in Jhalda about Rs. 10,000." He produced no accounts that day, but undertook to produce them subsequently. In the course of the proceedings, many adjournments were allowed to the assessee to produce the accounts on which he relied and he ultimately produced the accounts of his branches at Ranchi, Lohardaga, Calcutta, Jhalda and Gola, but not those of Burmo. It is not denied now that the assessee has business in these places, but his return only mentioned three

3. It is admitted that no formal notice under section 23 (2) was issued on the assessee; but in my opinion the section was substantially complied with, as the assessee appeared with most of the accounts called for. Moreover, on one of the intermediate dates of hearing, the assessee was directed to appear with all his account books and one, the Calcutta *Nakal Bahi* which was specially required, was definitely mentioned. Thus, the assessee was quite clearly told what documents were required. Section 23 (2) lays down that evidence may be called for "in support of the return"; in calling for the complete account books after the return was filed, the Income-tax Officer substantially complied with the provisions of section 23 (2), although no formal notice was issued. It may be noted that neither the Act nor any statutory rules prescribe any particular form of notice. In fact, it is difficult to say how there could be any evidence in support of a vague return in which the assessee did not commit himself to definite figures of either profit or loss.

4. It is further submitted that the assessee had deprived himself of his right to demand a reference to the High Court under section 66 (2). Such an application must be made within one month of the passing of the appellate order under section 31 or 32, and if there has been no appeal, the Commissioner rightly refuses the reference. [Vide *Thrikamji Jiwan Das v. Commissioner of Income-tax, Bihar and Orissa* (1)]. Under the proviso to sub-section (1) of section 30, there can be

no appeal if the assessment is made under section 23 (4), and the assessment is made under section 23 (4) if among other reasons the assessee has failed to comply with all the terms of a notice under section 22 (4). In the present case, a notice under section 22 (4) called for the production of two years' accounts of all branches. No accounts of one branch were produced at all and the accounts of the year previous to that whose income was under assessment were not produced for any branch. The assessee therefore had no right of appeal, and in strict view of law, the appellate order was null and void; and if the right to demand a reference to the High Court depends on the existence of an appellate order, which, it is submitted, must be a legal and valid order, no application under section 66 (2) could be made. Further, section 66 (3) provides for the assessee obtaining an order of the nature of a mandamus from the High Court in cases where the Commissioner has refused to make a reference on the ground that no question of law arises. It is true that I refused the application on that ground; but my order itself shows that I might have refused also on the ground that no application under section 66 (2) could lie in the absence of a valid appellate order. In the case already cited, the Hon'ble the Chief Justice expressed a grave doubt whether the High Court could call for a reference, where an application under section 66(2) was not maintainable at all.

JUDGMENT.

DAWSON MILLER C. J. :—It appears from the record of this case that the appeal was determined on the 12th June, 1924. It was not until the 22nd July that the assessee applied to the Commissioner for a review, or in the alternative for a reference to the High Court on a case stated. The Commissioner refused to state a case. He did not in terms draw attention to the fact that the application to state a case was made more than one month after the order passed under section 31 of the Income-tax Act, but it was not perhaps necessary for him to do so as he refused to state a case.

The matter then came before the High Court on an application by the assessee under sub-section (3) of section 66 and the High Court without having their attention called to the dates in the case directed the Commissioner to state a case upon certain points. The Commissioner has done so but our attention has been called to the fact that the application to state a case was out of time and therefore the assessee was not entitled under section 66 to the benefit of the provisions of sub-section (2) of that section. In these circumstances it seems to me the only thing that we can do is to confirm the assessment already made by the Income-tax Officer and afterwards affirmed on appeal. The application objecting to the assessment will be dismissed with costs. The hearing fee will be a sum of Rs. 300 including the money already deposited, that is to say, in addition to the deposit the hearing fee will be Rs. 200 payable by the assessee.

FOSTER J.—I agree

[140] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice

Krishnan and Mr. Justice Beasley.

[29th October, 1925.]

The Commissioner of Income-tax, Madras ...

Referring Officer

v.
King and Partridge

*Assessee.**

Income-tax Act (XI of 1922), Sec. 11—Payment of profession tax under Sec. 111, Madras City Municipal Act (IV of 1919)—If an expenditure incurred solely for the purposes of the profession—Not an admissible deduction.

* (1926) I. L. R. 49 Mad. 296; 50 M. L. J. 176; (1926) M. W. N. 478; 92 Ind. Cas. 943; A. I. R. (1926) Mad. 368.

Profession tax paid by an assessee under section 111 of the Madras City Municipal Act (IV of 1919) is not allowable as a proper deduction from his taxable income "as an expenditure incurred solely for the purposes of the profession" within the meaning of section 11 of the Income-tax Act (XI of 1922).

Strong and Co., Ltd. v. Woodfield; (1906) A. C. 448, Followed.

Case [Referred Case No. 3 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the decision of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, 1922 (Act XI of 1922) I have the honour to refer for the decision of the High Court the following question, viz., whether the profession tax levied under section 111 of the Madras City Municipal Act must be allowed as a deduction from the taxable income as an expenditure incurred solely for the purposes of the profession within the meaning of section 11 of the Indian Income-tax Act, XI of 1922.

2. In 1923-24 the petitioners paid a sum of Rs. 875 as profession tax. They claimed this as a deduction from their taxable income. It was disallowed by the Income-tax Officer and by the Assistant Commissioner on appeal. They have submitted a petition under S. 66 (2). As the question involves the interpretation of section 111 of the Madras City Municipal Act I state the case for the decision of the High Court.

3. In my opinion the profession tax is a contribution of a proportion of the firms' profit to the Municipality just as income-tax is a contribution out of the same profits to the Government of India. No doubt the petitioners are correct in referring to profession tax as "an outgoing which every one who exercises a profession beyond a certain magnitude has to pay," but income-tax, it appears to me, is on exactly the same footing. The one is a debt due to the Municipality and the other a debt due to Government. Both have to be ascertained and deducted before the profits available for distribution among the partners can be ascertained. Although the profession tax is usually based on general considerations such as the nature and reputed value of the business, the size and rental of premises, the quantity of articles dealt with and the number of persons employed, it is clear from R. 9 of Sch. IV of Madras Act IV of 1919 that the assessment is made on these considerations solely for convenience sake and that the real determining factor is the income of the assessee. The method of assessment is precisely the same as that followed under the old Income-tax Act of 1886, when the initial assessment was based on general considerations, leaving it to the assessee to claim an exact determination of income on accounts. S. 111 of the Madras City Municipal Act no doubt says that the profession tax shall be paid "by way of license fee," but this appears to me to mean "as a kind of license fee" and not "as a license fee." In *Commissioner of Income-tax v. Nedungadi Bank, Ltd.* (1), the learned Chief Justice observed that although the companies tax was nearer in analogy to a license fee than to an income-tax, it was not strictly a license fee. I am of opinion that the analogy between the profession tax and a license fee is even more remote, for while the companies tax is payable on the paid-up capital, the profession tax is really based on income. It is to be observed too that in *Commissioner of Income-tax v. Nedungadi Bank, Ltd.* (1), the Hon'ble Sir Murray Coutts Trotter in distinguishing the companies tax definitely classed profession tax with income-tax. The petitioners will no doubt lay great stress on the ruling in the case of *Patent Castings Syndicate Ltd. v. Etherington* (2), but that case relates to the United Kingdom Excess Profits Duty and in it Lord Warrington based his judgment mainly on the fact that the Excess Profits Duty had been definitely declared by statute to be an admissible deduction for income-tax purposes. That ruling is therefore in my opinion inapplicable.

(1) 1 I. T. C. 355; 47 Mad. 667.

(2) (1919) 2 Ch. 254.

R. N. Aingar, for the assessees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

This is a reference under section 66 (2) of the Indian Income-tax Act, XI of 1922 and the question submitted for our opinion is whether profession tax paid under section 111 of the Madras City Municipal Act should be allowed as a proper deduction from the taxable income "as an expenditure incurred solely for the purposes of the profession" of the assessee within the meaning of section 11 of the Income-tax Act.

The assessees are a firm of attorneys practising in Madras and they claim that they are entitled to the deduction above-mentioned. The Commissioner of Income-tax was of opinion that the deduction claimed was not an allowable item.

The answer to the question put to us depends in our opinion upon the nature of the profession tax levied by the Municipality. If the profession tax is a contribution from the income of the assessee to the Municipality, it will stand on the same footing as income-tax itself which is such a payment to the Government. It is clear in assessing the income of a person the income-tax he pays could not be deducted, for what is paid is a part of the income itself and not an expenditure for earning that income or profit. It was so ruled in *Ashton Gas Company v. Attorney General* (1) and the proposition is conceded before us. What then is the profession tax? Is it a payment made out of the income of the taxpayer or is it an expenditure which he has to incur to enable him to earn his income? We are of opinion that it is the former and not the latter.

Under the City Municipal Act (Act IV of 1919), section 111, every person not liable for the companies' tax who within the city and for a period of 60 days in the half-year exercises "a profession, art, trade or calling or holds any appointment public or private" bringing him within the taxation rules of Schedule IV is liable to pay the profession tax. Now Schedule IV makes it clear that the amount of tax payable is dependent on the income of the person taxed, the minimum being an income of Rs. 100 a month, except in the cases of hotel-keepers, etc., dealt with under class IX. Professional men are taxed not because they carry on their profession but because they do so and earn an income. The amount of tax varies with the income and if a person is overtaxed he has a right of appeal.

Now the nature of the tax cannot vary with the individual taxed. In the case of persons holding appointments under the Government it seems to us impossible to predicate that they pay profession tax to enable them to earn their salary. Section 111, explanation 2, makes even pensioners liable for profession tax as if they were holders of appointments carrying a salary equal to the pension. In their case it is still more difficult to treat the profession tax as a payment by them to earn their income. It is clear in those cases the Municipality claims a part of their income as a tax. A different rule it seems to us cannot be applied in the case of men who make their income by professional services. It is argued that because section 111 uses the words "by way of licence fee," we must hold that the payment of the profession tax is for the purpose of obtaining a licence to carry on one's profession in the city. We are unable to accept this argument. The Act deals with several matters in which the obtaining of a licence is a pre-requisite to the carrying on of a business or profession within the Municipal limits. We find examples of it in chapter XII of the Act. There is no provision in the Act which makes the carrying on of one's profession without paying the profession tax illegal; and no formal licence is issued on payment. The tax if unpaid can no doubt be collected by coercive processes of distraint, etc., but the carrying on of the profession is not interfered with. It is

clear therefore that the Act does not treat the profession tax as a payment for a licence. The words "by way of licence fee" seem to us to show that the payment is to be made in the manner of a licence fee but do not imply that in itself the tax is a licence fee. It is true that under Part II, Schedule 4, rule 9, the tax is estimated on general considerations and not on the exact amount of ascertained income of the person taxed. This merely provides a method of estimating one's income to avoid the trouble of having accounts produced and examined in every case. The fact that where an overestimate is made liberty is given to the person taxed to produce his accounts and prove his income and get his tax reduced indicates that the proper basis of the tax is the income earned. In this view payment of the profession tax cannot be held to be "an expenditure for the purpose of such profession", though it is incurred in connection with it. The words "for the purpose of" were construed by Lord Davey in the case of *Strong & Co., Ltd. v. Woodfield* (1), where the expression was "for purposes of the trade". His Lordship observed:—

"These words ... appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

Following that view we consider that the payment of profession tax does not fall within section 11.

The cases of *Smith v. Lion Brewery Co.*, (2) and of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3) were cited by the learned Counsel for the assesseees. But instead of helping him they show what may properly be treated as money spent for purposes of trade. The expenses referred to in those cases were directly incurred for the purpose of increasing the income of the trade and were therefore allowed to be deducted. These cases do not apply here in the view we take of the nature of the profession tax. Along with these cases should be considered the case of money spent for an anti-prohibition campaign by a brewer which was disallowed as a deduction, as it was held that it was not money directly spent for increasing the brewer's income, though it may have indirectly had that effect, *Ward & Co. v. Commissioner of Taxes* (4). The case of *Commissioner of Income-Tax v. Nedungadi Bank* (5) referred to the companies tax and not to the profession tax. The observation in it regarding profession tax that it stands on the same footing as income-tax supports the contention of the Government, but we do not look upon it as any authority on the point before us as the observation is only an *obiter dictum*. The case is not otherwise applicable. *Patent Casting Syndicates, Limited v. Etherington* (6) referred to excess profits duty which stands on a different footing altogether; as pointed out by the learned Judge there, it was declared by statute to be an admissible deduction. Furthermore, the case was one of net profits of the company on which dividend was payable to the manager and not an income-tax case.

For the above-mentioned reasons we have come to the conclusion that the amount of profession tax paid is not a proper deduction for assessment of income-tax and we answer the question submitted in the negative. The assesseees will pay the Commissioner's costs and vakil's fee Rs. 200.

T. D. Narasayya, Attorney for assesseees.

(1) (1906) A. C. 448, 453; 5 Tax Case 215.

(3) (1915) A. C. 433; 6 Tax Cas. 399.

(5) 1 I. T. C. 355; 47 Mad. 667.

(2) (1911) A. C. 150; 5 Tax Cas. 568.

(4) (1923) A. C. 145. ..

(6) (1919) 2 Ch. 254.

[141] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Foster.

[27th October, 1925.]

Nope Chand Mangniram

.. Assessee.

v.

The Commissioner of Income-tax, Behar and Orissa

... Referring Officer.

Income-tax Act (XI of 1922), Secs. 10, 23 (2), (3) and (4) and 42 (1)—Notice to produce accounts in support of return—Extensions of time therefor—Notice to show cause against provisional assessment—Non-appearance of assessee—Assessee, if entitled to notice under Sec. 23 (3)—Notice to treat assessee as agent of non-resident—If precludes subsequent assessment of assessee—Claim for allowances under Sec. 10—Onus on assessee.

The assessee called upon to appear with his accounts in support of a return of loss submitted by him produced certain accounts and after an extension of time therefor, produced further accounts in an unadjusted state and got further time for production of accounts. The accounts were then examined and a notice was served on the assessee to show cause against an assessment of Rs. 45,000 and odd. Another notice was served on him to show cause why he should not be treated under Sec. 42, (1) of the Income-tax Act as the agent of a non-resident in respect of a sum of Rs. 20,155 shown in his return as payment of interest to the latter. The assessee failed to appear on the date fixed and asked to be assessed on the basis of accounts already produced.

Held, (1) that the provisions of Sec. 23 (2) of the Income-tax Act were complied with when notice was issued to the assessee to show cause against the proposed assessment and the assessment was one rightly made under Sec. 23 (3) of the Act and not under Sec. 23 (4), and

(2) that the notice under Sec. 42 (1) of the Act did not preclude the Income-tax Officer from treating the sum alleged to have been paid as interest to the non-resident, as the income of the assessee.

Where the assessee seeks to deduct from his business profits certain items as allowances under Sec. 10 of the Income-tax Act, the onus of proving that such allowances are permissible rests with him.

Case referred to the High Court under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Behar and Orissa, in compliance with the order of High Court in Miscellaneous Judicial Case No. 143 of 1924.

CASE.

By the order of the Hon'ble Mr. Justice Ross and the Hon'ble Mr. Justice Kulwant Sahai in Miscellaneous Judicial Case No. 143 of 1924, I am directed under section 66 (3) of the Indian Income-tax Act, 1922, to refer to the High Court the following questions arising out of the assessment to income-tax in the year 1923-24 of the firm of Nopechand Mangniram :—

(i) Whether there is in law any evidence that Ghatsiram Lachminarayan, to whom a sum of Rs. 5,357 was paid, was a partner of the assessee?

(ii) Whether there is in law any evidence that a sum of Rs. 5,278 paid to the relatives of the assessee was paid as interest on partner's capital?

(iii) Whether as to a sum of Rs. 20,155 paid by the assessee to persons outside British India it was open to the Income-tax authorities to assess him as principal after having called upon him to show cause why he should not be charged in respect of this sum under section 42, clause (i)?

(iv) Whether without calling upon the assessee to produce the Calcutta accounts after they had been once examined in Calcutta, any conclusion could be arrived at in law against the assessee in respect of sums shown in these accounts, regard being had in particular to the provisions of sections 37 and 38 of the Act?

2. I must first bring to their Lordships' notice certain facts that suggest to my mind a doubt whether the High Court has any jurisdiction to call on the Commissioner to make a reference in this case. Section 66, sub-section (3) provides that if on any application being made under sub-section (2) of the same section, the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court, if it is not satisfied with the Commissioner's decision, may require him to state a case.

3. A valid application to the Commissioner under sub-section (2) is thus a condition precedent to an application under sub-section (3). We have next to see in what circumstances an application may be made to the Commissioner under sub-section (2). That sub-section opens with the words "within one month of the passing of an order under section 31 or section 32 the assessee in respect of whom the order was passed may by application accompanied by a fee . . . require the Commissioner to refer to the High Court any question . . .". It is thus evident that as the existence of a valid application under sub-section (2) is a condition precedent to the presentation of a valid application under sub-section (3), so the existence of a valid order under section 31 or 32 is a condition precedent to the presentation of a valid application under sub-section (2). Consequently the existence of a valid order under section 31 or 32 is a condition precedent to a valid application under sub-section (3) of section 66. That is to say, I would submit that unless a valid order under section 31 or section 32 has been passed, in the present case your Lordships have no jurisdiction to entertain the application under section 66 (3), or to pass orders on the reference made by the Commissioner to your Lordships in pursuance of the order of the Hon'ble Judges purporting to act under section 66, sub-section (3).

4. I would next invite your Lordships' attention to the proviso to section 30, sub-section (1). This runs as follows "provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23". Turning to sub-section (4) of section 23, we find that "If any person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section, or having made a return fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment". Thus the circumstances in which no appeal lies are described and it remains to consider their application to the facts of the present case. The assessee filed a return in the form prescribed by rule under section 59 of the Act, though he did not indicate at either of the two places provided in the form for what period he was showing his income. He attached to the return an abstract of his accounts at various places but did not include any accounts relating to the Calcutta branch belonging to the firm. The return was therefore not a complete return in the prescribed form, nor was it verified in the prescribed manner owing to the omission of any date in the verification, as required by sub-section (2) of section 22. After the return had been filed, the party was directed on the 9th August 1923 to appear with his accounts on the 27th August. On the 27th August the assessee took time and he appeared with accounts of one year only on the 14th September, but on that date he undertook to produce two years' accounts and was directed to do so on the 2nd October. On that date the assessee was specifically told to produce the accounts of 1977-78, 1978-79 and 1979-80. On the date fixed, namely, the 1st November, the accounts of 1977-78 were not produced; they were again called for by the 26th November together with the *Bijaks*, but neither the accounts nor the *Bijaks* were produced. Again, on the 26th December, the proprietor refused to take a notice calling for accounts of 1977-78 and the accounts of this year were in fact never produced at all. Thus it is clear that the assessee failed to comply with all the terms of a notice under section 22 (4). I admit that the record does not prove whether a formal written notice was served on the assessee except on December 26, but the assessee or his representative affixed his signature to the written order passed on the 9th August, the 14th September and the 2nd October, and as no form of notice has been prescribed either by law or statutory rule, I submit that the section requiring service of notice was complied with. In my opinion, therefore, the assessee neither complied completely with the provisions of section 22 (2) nor with all the terms of a notice issued under section 22 (4), and that consequently the assessment could only be made legally under section 23 (4), and the fact that the Income-tax Officer did not specify this section in the assessment order is immaterial. If he did not act under that sub-section, there was no other provision of law under which he could act. Consequently, the assessee under the proviso to

section 30 (1) had no right of appeal. Therefore the order purporting to be passed under section 31 by the Assistant Commissioner was null and void, since he has no power to entertain an appeal or dispose of it in the circumstances in which the law explicitly said that there shall be no appeal. Consequently, the conditions precedent to an application under section 66 (2) do not exist and my order purporting to be passed under section 66 (3) refusing to state a case possesses no legal status and therefore the conditions precedent to an application to the High Court under section 66 (3) are also absent, so that the High Court, therefore, has no jurisdiction in the matter. I would further submit that the fact that I overlooked the circumstances that the assessee had made an incomplete return and had not complied with all the terms of a notice issued under section 22 (4) and consequently had no right to claim a reference to the High Court does not affect the situation, because neither I nor any one else has any power under the law to condone or ignore the defects which I have pointed out.

5. Should your Lordships, however, hold that the Court has jurisdiction, I proceed to state the facts and my opinion thereon as required by law regarding the questions propounded by the Court.

6. Before dealing with these points separately, I have to submit that there appears to underlie all the questions an assumption that the Income-tax Officer who, under the terms of section 37 of the Indian Income-tax Act, 1922, is, when making an assessment, conducting a judicial proceeding, is not only a judge, but also a party to the proceedings with the assessee as the opposite party. It seems to be implied that the assessee is to produce his evidence and then the Income-tax Officer is to produce rebutting evidence, as though he were a party; and, finally the Income-tax Officer, in his capacity as a judge, is to decide whether he or the assessee has proved his case. In an income-tax proceeding, there is only one party and the object is to determine his assessable income as accurately as possible. The facts to be proved are facts specially within the knowledge of the assessee and the burden of proving them is on him under section 106 of the Indian Evidence Act. If, therefore, for example, the assessee claims that certain payments appearing in his accounts ought to be set off against his profits, it is for him firstly to prove that the payment was made at all, and, secondly, that they were of such a nature that he is entitled under the Act to deduct them from his receipts. In practice, the Income-tax Officer accepts the entry in regularly kept accounts as evidence that the payment was made, though if he doubts the accounts, he is entitled to demand the production of stamped receipts signed by the recipient; but he must at least have proof that the payments are legitimate deductions from the profits and if no evidence on this point is forthcoming, he is entitled to disallow the payment, and it is only on a false analogy between an assessment proceeding and a civil suit that it can be held that the Income-tax Officer must prove that deductions claimed are inadmissible, though the assessee has failed to prove that they are admissible.

7. That the assessee's evidence even if unrebutted is not necessarily conclusive is shown by the judgment in *Stocks v. Sulley* (1) and by the judgment of the Allahabad High Court in *In the matter of Lachman Das Narain Das of Cawnpore* (2). In both these cases, an assessment based mainly on special experience and knowledge of the assessing officers was upheld, though there was no other evidence on behalf of the Crown, and there was evidence by the assessee. In the present case, as I shall submit later on, there was not even any evidence by the assessee to be rebutted.

8. With these remarks which may be considered as part of my opinion on the questions framed by the Court, I proceed to consider the questions separately giving the facts and such further opinion as is necessary.

(i) The accounts of the Khagaria Oil Mill showed payment of interest amounting to Rs. 5,357 to Ghatsiram Ram Lachhmi Narayan of Jaipur. The assessee offered

(1) (1899) 4 Tax. Cas. 98.

(2) 2 I. T. C. 1.

no evidence that he had borrowed money for the purposes of his business from this individual on such terms or conditions as would make the interest deductible under section 10 (2) (iii). The personal account of this man shows that the firm (the assessee) owes him Rs. 1,35,000. It does not require any special knowledge or experience in business matters to infer that a man residing in Jaipur will not allow a Behar firm to remain in his debt for so large an amount which is unsecured, unless he holds an interest in the firm as proprietor. This inference was drawn by the Income-tax Officer and the assessee was given an opportunity to make any representation, but no evidence to rebut the inference was offered by the assessee either to the Income-tax Officer or to the Assistant Commissioner or to me.

(ii) The interest account of the Barhaiya branch showed payments amounting to Rs. 5,278 out of which Rs. 114 was shown as paid to Nopechand Mangniram, Rs. 900 to a *karpardaz*, and the rest in 13 items to relatives, mostly women. The first item is clearly a proprietor's drawing, and as regards the rest, the assessee has not even attempted to offer any evidence that his relations and servants have formally lent money to the firm. In the absence of any evidence to the contrary, I am of opinion, for the reasons given in paragraphs 2 and 3, that the Income-tax Officer was justified in inferring from his special knowledge and experience of the manner in which Indian trading accounts are usually kept, that these payments represent interest on a partner's capital debited, as usual, in the name of various women. No evidence to rebut this inference was offered either before me or before the Assistant Commissioner.

(iii) The accounts examined by the Income-tax Officer, Calcutta District No. I, contained entries showing payment of Rs. 20,155 as interest to 4 persons residing in Native States. A notice was issued on February 7, 1924, on the assessee to show cause on February 14, why he should not be treated under section 42 (i) as the agent of three of these persons (the 4th was omitted from consideration as he was shown as having received less than Rs. 2,000). The assessee put in no appearance on February 14, and as neither payment was proved, nor any evidence offered that this interest was paid on money borrowed for the purposes of business, the amounts were included in the amount to be assessed. In a petition filed before the Assistant Commissioner during the pendency of the appeal, the assessee stated that he was not the agent of the persons mentioned, while in arguing the review application before me, his pleader stated that he desired to be assessed as agent under section 42 (1). When the assessee, so far from offering any evidence, cannot even make up his own mind what status he should be regarded as possessing, the Department has no alternative but to compute the income on the materials before it.

It is submitted that while the proviso to section 43 makes it incumbent on the Income-tax Officer to give a person whom it is proposed to treat as an agent an opportunity of being heard, there is no provision that such a person should not be treated as a principal when he has given no proof of the nature of the payments alleged by him to have been made to a non-resident. In the assessment actually made, sections 42 and 43 have no application; all that was done was to disallow the alleged payments as unproved which were therefore added back to the book profits. It may be mentioned that the assessee's statement in paragraph 4 of his application to the High Court that similar payments were allowed in the previous year's assessment is not supported by a reference to the record of that year.

(iv) The accounts of Calcutta were examined on some date before December 11, 1923, which is the date of the letter from the Income-tax Officer, Calcutta District No. I, who reported the result of the examination to the Income-tax Officer, Monghyr, on December 30, 1923; the candidate (*sic*) Income-tax Officer suggested an assessment which included the sum of Rs. 20,155 in the amount to be assessed. This suggested assessment was communicated to the assessee to allow him an opportunity of discussing it on February 3, with the Income-tax Officer. On that date no one appeared; but on the next day a petition was filed that the assessee was ill. The assessment was kept pending till the expiry of the period fixed for hearing the assessee on

the point of agency (*vide* the preceding paragraph) and was not finally made till after February 14. As the assessee himself declined, though given an opportunity, either to produce evidence or to appear and make any representation, I am of opinion that neither the Income-tax Officer nor the Assistant Commissioner, nor I was bound to compel the production of any documents. Sections 37 and 38 of the Income-tax Act merely confer certain powers and do not mention any circumstances in which such powers must be used. It is submitted that the natural interpretation of the intention of section 37 is that it should be used to compel the production of something which it is contrary to the owner's interest to produce and which he therefore does not produce voluntarily, or something which another party declines to produce, and not that it should be used to compel the production of anything which is in the assessee's own custody and on which he relies to prove his own contention. In the latter circumstances, no compulsion ought to be required, and if the document is not produced, the Income-tax Officer is entitled under illustration (g) to section 114 of the Evidence Act to presume that the assessee cannot prove his contention.

JUDGMENT.

DAWSON MILLER C. J. :—This is a reference under section 66 (3) of the Indian Income-tax Act, 1922, relating to the assessment of income-tax of the firm of Nope Chand Mangniram for the year 1923-24.

The questions in dispute cover three items of Rs. 5,357, Rs. 5,278 and Rs. 20,155 which have been included in the assessment as taxable income of the assessee. From the books of account produced these sums appear to have been paid out of the gross profits of the firm to various persons. The question with regard to the first two items is whether they represented interest on loans taken by the firm from the persons to whom the sums were paid. The question with regard to the third item is whether the sum of Rs. 20,155 which was paid to persons outside British India should be treated as part of the assessee's income, or whether under the provisions of section 42 of the Act, it should be treated as the income of the recipients and the tax collected from the assessee as agent on their behalf. In the latter event the rate would be lower than if the sum in question were treated as part of the assessee's income.

It appears that the assessee carries on business at Monghyr and other places in this Province as well as at Calcutta. For the purposes of the present assessment Monghyr has been treated without objection as the principal place of business and the assessment was finally made by the Income-tax Officer there, the sum assessed being Rs. 45,228-13-3 including the items in dispute. From this assessment the assessee appealed to the Assistant Commissioner of Income-tax at Patna with the result that the assessment was reduced to Rs. 27,794 to which was added the sum of Rs. 7,161 being the assessment of the Nirmali branch of the firm, making a total assessment of Rs. 34,955. On review the Commissioner of Income-tax reduced the assessment by a further sum of Rs. 3,000 but refused a prayer to state a case with respect to the items now in dispute. In January last on the application of the assessee and after hearing Counsel for the Commissioner of Income-tax, the Court directed the Commissioner to state a case with regard to the three items above mentioned.

From the case stated and from the documents filed it appears that on the 24th May 1923 notice was served on the assessee to file a return of income in the prescribed form. On the 29th June the return was filed showing a loss of over Rs. 40,000. On the 9th August the assessee was directed to appear with his accounts on the 27th August. The time was extended to the 14th September when certain accounts were produced and others were called for. On the 2nd September further accounts in an unadjusted state were produced and the assessee was ordered to produce further evidence by the 1st November. On that date further time was given up to the 26th November for the production of accounts. The accounts were then examined in the office with the result that a recommendation was made that the assessee should be assessed at the sum of Rs. 45,228-13-3. On the 25th January 1924 he was served with notice to show cause by the 3rd February why he should not be assessed at that

sum. He failed to appear on the day fixed but on the following day filed a petition saying he was ill and could not appear and asked that he might be assessed on the basis of his accounts already produced. On the 6th February he was also served with notice to show cause by the 14th why he should not be treated as agent of the persons residing outside British India to whom payment of interest amounting to the sum of Rs. 20,155 had according to his return been made. Again he failed to appear and in the result in the absence of any evidence either that the sums in dispute had been paid or that they represented interest on loans these sums were treated by the Income-tax Officer as taxable income.

The main contentions on behalf of the assessee were, first, that as the return was not accepted by the Income-tax Officer the assessee was entitled to a notice under section 23 (2) requiring him to attend at the Income-tax Office or to produce or cause to be produced any evidence on which he relied in support of his return and that this was not done and, secondly, with regard to the sum of Rs. 20,155 that it was not within the competence of the Income-tax Officer to treat this sum as part of the assessee's income after he had been called on to show cause why he should not be treated as the agent of the recipients.

The answer to the first point seems to me to be that the provisions of section 23 (2) were complied with when notice was issued to the assessee on the 25th January 1924 to show cause why he should not be assessed at the sum therein named. He was then given every opportunity of appearing and producing any further evidence he might rely on but he failed to take advantage of the opportunity and asked that the assessment should be made on the evidence already produced. It was not, in my opinion, a case where the assessee failed to comply with a notice issued under sub-section (2) of section 23 so as to make it incumbent on the Income-tax Officer to make the assessment under sub-section (4) of section 23. The evidence that the assessee wished to rely upon was all before the Income-tax Officer and assessment was rightly made under section 23 (3). It was suggested in the course of argument that the assessment could not in the circumstances be made under the third sub-section but should have been made under sub-section (4) as the terms of the notice, if any, were not complied with, but even so and assuming the assessment should have been under sub-section (4), this would not help the assessee as in that case no appeal would lie under section 30 and consequently no right to have a case stated would arise. Indeed the Commissioner in the case stated has taken this point urging that the assessment must have been under sub-section (4) of section 23 and consequently under the proviso of section 30 no appeal lay to the Assistant Commissioner and the order passed under section 31 was *ultra vires* and consequently under the provisions of section 66 (2) and (3) the Court had no jurisdiction to order a case to be stated. As I have already pointed out the assessment was not made under sub-section (4). Had it been so the demand notice would have shown that no appeal lay and certainly no appeal would have been entertained. Moreover if the Court had no jurisdiction to pass an order under section 66 (3) the point should have been raised on behalf of the Commissioner when the rule was heard but the Income-tax authorities and everybody else until the case was stated have treated the assessment as being made under section 23 (3) and I think rightly.

With regard to the second point I am of opinion that the notice calling upon the assessee to show cause why he should not be treated as agents for the recipients of the sum of Rs. 20,155 did not preclude the Income-tax Officer from treating the sum in question as the income of the assessee. He had already been called on to show cause why he should not be assessed at a figure which included this item as part of his income and the later notice was merely an alternative in the event of the sum being proved to be interest on loans due to persons outside British India. Both questions might have to be considered but the second would only arise in the event of the sum in question being found to be interest on loans and in my opinion the notice of the 6th February did not preclude the Income-tax Officer from treating the sum in

question as part of the assessee's taxable income in the absence of any explanation or any evidence to the contrary.

With regard to the two sums of Rs. 5,357 and Rs. 5,278 the Commissioner was further directed to consider the question whether there was any evidence that these sums were paid to the recipients thereof as interest on partners' capital. With regard to the first sum which was paid to Ghatsiram Lachmi Narayan of Jaipur no evidence was offered that money had been borrowed from Ghatsiram for the purposes of the assessee's business on such terms or conditions as would make the interest deductible under section 10 sub-section (2) clause (3) of the Income-tax Act. It further appeared that the assessee owed him a sum of Rs. 1,35,000. The Income-tax Officer inferred that it was highly improbable that Ghatsiram residing in Jaipur would allow a Behar firm to remain in his debt for so large an amount unsecured unless he held an interest in the firm as proprietor and no evidence to rebut this inference was offered by the assessee either before the Income-tax Officer or before the Assistant Commissioner on appeal or before the Commissioner on review. I think that in the circumstances the Income-tax Officer was perfectly justified in drawing the inference. With regard to the sum of Rs. 5,278 again no explanation was offered as to this amount. It did appear, however, from the evidence produced that over Rs. 1,000 of this was paid partly to Nope Chand Mangniram and partly to his *karpardaz* and the rest to relatives mostly women. In the absence of any evidence in support of the deduction of the item the Income-tax Officer refused to believe that these servants and relatives had lent money to the firm and acting upon his special knowledge and experience of the manner in which Indian trading accounts are usually kept, he concluded that these payments represented interest on a partner's capital debited as frequently happens in the names of various relations. Again I think the Income-tax Officer was in the circumstances justified in drawing this inference.

I have already dealt with the questions in dispute as to the item of Rs. 20,155. I may add that it appears from the Commissioner's statement of the case that during the pendency of the appeal the assessee in a petition stated that he was not the agent of the persons to whom this sum was paid although at a later age when the matter was before the Commissioner on review the assessee's pleader stated that he wished to be assessed as agent. As the Commissioner of Income-tax has stated "When the assessee, so far from offering any evidence, cannot even make up his own mind what status he should be regarded as possessing, the Department has no alternative but to compute the income on the materials before it." It may be pointed out that if the assessee seeks to deduct from his business profits certain items on the ground that they are allowances within the meaning of section 10 of the Act, the onus of proving that such allowances are permissible rests with him. In the present case I think that the assessment was right and that the assessee's petition should be dismissed with costs. Hearing fee Rs. 200 including the sum of Rs. 100 already deposited.

FOSTER J.:—I agree.

[142] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[9th November, 1925.]

The Commissioner of Income-tax, Madras

.. Referring Officer.

v.

Subramanya Sastrigal

.. Assessee.

Income-tax Act (XI of 1922), Secs. 2 (1) (a) and 10—Assessee carrying on money lending business—Loans on usufructuary mortgages—Mortgaged lands leased back to mortgagors—Income therefrom, if agricultural income.

The assessee carrying on a money lending business lent money in the course of such business on the security of lands usufructuarily mortgaged to him and on the same day as the mortgages

he leased those lands back to the mortgagors with stipulations for fixed annual payments as rent amounting to a definite percentage on the respective loans advanced and for payment of Government kist by the mortgagors. On an assessment to income-tax of the income derived from the usufructuary mortgages,

Held, that on the finding by the Commissioner that the mortgages were taken in the course of the money lending business, the aforesaid annual payments could not be excluded from the assessment of the profits and gains of the assessee's business as agricultural income within the meaning of Sec. 2 (1) (a) of the Income-tax Act.

Case [Referred Case No. 18 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, by letter No. 1118 of 1925, dated the 12th September 1925, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following question of law :—

If a person carrying on money lending business lends money in the course of such business on the security of lands of which he takes usufructuary mortgages and if he immediately leases these lands back to his customers with stipulations for fixed annual payments (which amount to a definite percentage on the respective sums advanced), should these annual payments be excluded from the assessment of the profits and gains of his business as agricultural income within the meaning of section 2 (1) (a) of the Indian Income-tax Act.

2. The petitioner was assessed on an income of Rs. 150 from property, rupees 500 from profession as a purohit and Rs. 7,200 from business. The figure adopted under business was merely an estimate. The assessee did not produce accounts but only a list of his transactions. The Income-tax Officer held the list to be incomplete and for various reasons which need not be detailed, estimated the petitioner's income under this head at Rs. 7,200. It is admitted that the estimate was based on the idea that income from usufructuary mortgages leased back to the borrowers was liable to income-tax and it has been agreed between the petitioner's Vakil and myself that, if the High Court holds that such income is not liable to income-tax, the estimate under money lending will be reduced to Rs. 3,000.

3. Translations of one typical mortgage deed and of the connected lease deed are appended, A & B. It will be seen that the lease back was executed on the same day as the mortgage, that the borrowers pay the Government kist and that the annual lease amount is exactly 9 per cent. on the sum advanced by the money lender.

4. In these circumstances I am of opinion that the income received or receivable by the capitalist is not income derived from land but income derived from the business of money lending. It appears to me that taxing authorities and courts in such a case as this must look to the substance of the transaction. The source of the petitioner's income is his money lending business and the mortgage and lease back are merely devices adopted partly to protect his capital and partly to secure his business profits from liability to income-tax. It is evident from the drafting of section 2 (1) of the Income-tax Act, XI of 1922, that the object of the exemption of agricultural income is to avoid subjecting the income from land to double taxation, once in the form of land revenue and once in the form of income-tax.

EXHIBIT A. (TRANSLATION).

Deed of mortgage with possession and enjoyment executed this 29th day of August, 1923 by the sons of Gopalaswami Mohithay Row, Maharatta caste, Vaishnavite religion, landholders,

- (1) Appaswami Mohithay Row, aged about 33
- (2) Ramachandra Mohithay Row, aged about 28
- (3) Narayanaswami Mohithay Row, aged about 20 and
- (4) Chathrugna Mohithay Row, minor aged about 16, by his guardian, protector and brother No. 1 Appaswami Mohithay Row,

residing at Salakkarai Street, Ammapet, Papanasam Taluk, Tanjore district, in favour of Subramania Sastrigal, son of Swaminatha Sastrigal, Brahmin caste, Saivite religion, landholder, residing at No. 364, West Street, Tanjore Fort.

We have received the sum of Rs. 37,000 as loan from you on the mortgage with possession of the undermentioned wet and dry lands, house sites, tope, houses &c., which originally belonged to our ancestors, subsequently enjoyed by our father and at present being enjoyed by us in our right and possession. The details of the receipt of this sum of Rs. 37,000 by us are :—

Rs. 35,500 being the sum that we have to pay for the purpose of redeeming the promissory notes and mortgage bonds executed by us for loans borrowed for family purposes—at present retained with you—executed by us and our father the late Gopala-swami Mohithay Row, our brother the late Kasinatha Mohithay Row and the late Lakshmana Mohithay Row, the younger brother of (1) and (2) and the elder brother of (3) and (4) above, the simple mortgage bonds executed in favour of Kumbakonam A.V. Ramaswami Ayyar, Enangudi Ramayya Nayudu and R. Swaminatha Ayyar and usufructuary mortgage bonds executed in favour of Eswara Baghavathar and Thangavelu Pillai of Madura and the promissory notes executed in favour of Dharmalingam Pillai, Natesa Thonkondar, Nayanappa Chettiar, Abhirami, Varadaraja Kalingarayar, Vayyapuri Pillai, Pichiammal, Periaswami Mudaliar, Vasudeva Rao, Kamalabai and Veerappa Chettiar.

Rs. 1500 being cash received from you for the purposes of repaying small hand loans of our family and defraying our family expenses and for the registration fees etc., of this document.

As we have received this Rs. 37,000 being the total of the items as per particulars above, you will *in lieu of interest* enjoy the undermentioned wet and dry lands, buildings, sites, topes, houses etc., after paying the revenue, taxes etc., for a period of 5 years from the above date. After the prescribed period in whichever Chithrai Kalavathi, you demand the mortgage amount we will pay and redeem the lands. We have executed this usufructuary mortgage deed after assuring you and making you believe that except the simple and usufructuary mortgages in favour of the persons specified above, there is no other usufructuary or simple mortgage, sale, maintenance, security, exchange, gift or other previous encumbrances on the properties. In support of this we have given a patta and encumbrance certificate from 1895 to 1923. We will redeem the above mentioned loan documents and hand over to you the original documents as security.

EXHIBIT B. (TRANSLATION).

The cash lease deed executed this 29th day of August, 1923, by the sons of Gopalaswami Mohithay Row, Maharatta caste, Vaishnavite religion, landholders,

- (1) Appaswami Mohithay Row, aged about 33
- (2) Ramachandra Mohithay Row, aged about 28
- (3) Narayanaswami Mohithay Row, aged about 20 and
- (4) Chathrugna Mohithay Row, minor aged about 16, by his guardian, protector and brother Appaswami Mohithay Row,

residing at Salakkarai Street, Ammapet, Papanasam Taluk, Tanjore district, in favour of Subramania Sastrigal, Brahmin caste, Saivite religion, landholder, residing at No. 364, West Street, Tanjore Fort. We have agreed to pay you in cash the sum of Rs. 4,200 per year on contract in lieu of the paddy, kar and semba, green gram, hay, produce from dry lands, house-rent etc., (being the yield from the lands) which we have to pay every year on the undermentioned wet and dry lands, house sites, tope, houses etc., which we have this day mortgaged to you and of which you are in enjoyment and which we take on lease for a period of 3 years from Ruthrothkari to Krothana. Out of this sum of Rs. 4,200, excluding the sum of Rs. 870 being the Sircar kist on the above-said lands, house-tax etc., which we have agreed to pay on your behalf, get a receipt for the same and enter the receipt of the money in this document, we will pay the balance of Rs. 3,330 before the 30th Masi of every year and enter the

same in this document. If we fail to pay the lease amount on the due date or fail to pay the kist and house-tax, or if there was any balance in payment, in addition to our losing our right to hold the lease we bind ourselves and our descendants to pay the lease amount etc., with interest thereon at the rate of 12 annas per hundred per mensem from the date of default to the date of payment whenever you demand the same from out of our other property. After the period is over we will place you in enjoyment of the above-mentioned lands. You have no connection whatever with any loss that may arise in the above-mentioned lands from floods, drought, act of King, act of God, etc., or if there was increase or decrease in the Sircar kist, house tax, etc.

K. V. Sessa Iyengar, for *A. V. Visvanatha Sastri*, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The finding of fact in this case necessarily involves that the question propounded in the reference, should be answered in the negative. The assessee will pay the costs of the Commissioner of Income-tax, Madras, Rs. 250 (Rupees two hundred and fifty)

[143] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[11th November, 1925.]

Sheik Abdul Kadir Marakayar and Co.

.. Assessee.*

v.

The Commissioner of Income-tax, Madras

Income-tax Act (XI of 1922), Secs. 33 and 66 (1) (2) and (3)—Review proceedings of the Commissioner—Assessee applying for stating a case therein—Improper refusal by Commissioner—High Court, jurisdiction of, to compel a reference—Specific Relief Act (1 of 1877), Sec. 45.

If in the course of proceedings under section 33 of the Income-tax Act a real question of law arises and the Commissioner improperly declines to state a case thereon, the High Court has jurisdiction under the general powers conferred by the Specific Relief Act, read with section 66 (1) of the Income-tax Act, to compel the Commissioner to state a case for the opinion of the Court.

Alcock Ashdown & Co. v. Chief Revenue Authority, 1 I. T. C. 221, Applied.

Application under section 45 of the Specific Relief Act (1 of 1877) and section 66 of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Madras, to state a case for the opinion of the High Court.

K. S. Krishnaswami Ayyangar, instructed by *N. Srinivasa Ayyangar*, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

By section 66 (1) of the Indian Income-tax Act, 1922, it is enacted, "If in the course of any assessment, . . . a question of law arises, the Commissioner may, either on his own motion or on reference from any income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court" and by sub-section (2), "Within one month of the passing of an order under section 31 or section 32, the assessee in respect of whom the order was passed, may, by application accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court." There is a proviso with which we are not concerned enabling the assessee if the final determination of the Commissioner under section 33 is favourable to him, to withdraw his application and get a refund of the fees that he paid. By sub-section (3), "If, on any application being made under sub-section (2),

* (1926) I. L. R. 49 Mad. 725.

the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court and the High Court if it is satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and to refer it and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly."

It is clear that sub-sections (2) and (3) of section 66 are in terms limited to orders passed under sections 31 and 32. As to orders in review passed by the Commissioner under section 33 as in the present case, there is nothing to operate upon except section 66 (1) and the assessee has no remedy unless we hold that the court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under section 33. The Privy Council has held in *Alcock Ashdown and Co. v. Chief Revenue Authority, Bombay* (1), that the words of the older Act of 1918 import a mandate to the Commissioner to state a case where a real point of law arises, and has further held that if he improperly declines to do so the court may compel him under the general powers of the Specific Relief Act. It is conceded by Mr. Patanjali Sastri that sub-sections (2) and (3) of section 66 of the present Act only applies to orders under sections 31 and 32; but he asks us to draw the inference that the power of the High Court was meant to be confined to cases under those sections and was by implication taken away in the case of orders under section 33. The result would be that the Commissioner by calling up the records under section 33 would be in a position to burke any further enquiry whatever. We do not think that that can have been intended and we accordingly hold that the principle of *Alcock Ashdown and Co. v. Chief Revenue Authority, Bombay* (1), must be applied to orders under section 33. It follows that the statute has set a period of limitation on applications which relate to orders passed under sections 31 and 32 and not on those which relate to orders passed under section 33. The answer appears to be that the jurisdiction conferred by section 45 of the Specific Relief Act is discretionary and that in the case of unreasonable and unexcused delay the court would refuse to exercise it.

The Court therefore directs the Commissioner to state a case, it not being seriously contended that there is not a substantial point of law involved. Costs of this application reserved.

[144] IN THE CHIEF COURT OF OUDH.

Before Mr. Justice Wazir Hasan and Mr. Justice Ashworth.

[7th December, 1925.]

The Lucknow Ice Association

..

Assessee.*

v.

The Commissioner of Income-tax, United Provinces

..

Referring Officer.

Income-tax Act (XI of 1922), Secs. 3 and 66—Lucknow Ice Association—If a firm within Sec. 3—Oudh Chief Court—If a High Court for references under Sec. 66—Oudh Courts Act, Secs. 3 and 8—General Clauses Act (United Provinces), Sec. 4 (21).

The proprietors and managers of five ice factories formed themselves into an association, by the name of Lucknow Ice Association, for the promotion and protection of their ice business. The Association under the management of the parties was to have the entire control over the manufacture, sales and distribution of the profits of the constituent factories, to fix rates and prices, adjust accounts and determine other matters arising out of the agreement and the sale proceeds were to be distributed among them in certain proportions. On an assessment of the Association,

Held, that the Association was a firm within the meaning of section 3 of the Income-tax Act and as such, was liable to assessment under the Act.

By virtue of sections 3 and 8 of the Oudh Courts Act, 1925, read with section 4 (21) of the General Clauses Act (United Provinces) 1904, the Chief Court of Oudh is a High Court within the meaning of section 66 of the Income tax Act with jurisdiction to hear references thereunder.

Case [Reference No 1 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, for the opinion of the Chief Court.

* (1926) 92 Ind. Cas. 257; A. I. R. (1926, Oudh 191.
(1) 1 I. T. C. 221; 47 Bom. 742.

CASE.

I have been asked to make a reference to the Judicial Commissioner of Oudh under section 66 (2) of the Indian Income-tax Act, 1922, in connection with the rejection of an appeal filed before the Assistant Commissioner of Income-tax, Cawnpore, in respect of the assessment of the Lucknow Ice Association.

2. A preliminary question arises in view of the fact that the meaning of the term "High Court" in the Indian Income-tax Act, 1922, is not exactly defined. In section 3 (24) of the General Clauses Act, however, a High Court is defined in the following terms: "High Court used with reference to civil proceedings, shall mean the highest civil court of appeal in the part of British India in which the Act or Regulation containing the expression operates." The Hon'ble High Court of the North-Western Provinces at Allahabad has jurisdiction in certain special classes of cases arising in Oudh, but so far as other cases are concerned the definition of a High Court in the General Clauses Act would appear to be applicable to the Court of the Judicial Commissioner of Oudh. References under section 66 of the Indian Income-tax Act, 1922, may not, however, fall strictly within the definition given above, while in the Income-tax Act "High Court" has not been defined. It therefore appears desirable to frame a preliminary issue on the question of jurisdiction in the following terms:—

Whether the Judicial Commissioner of Oudh has jurisdiction to hear references made under section 66 of the Indian Income-tax Act, 1922, in respect of firms whose principal place of business is in Oudh.

3. The facts on which the reference is to be made are as follows:—

The proprietors or managers of five ice factories in Lucknow joined in forming an Ice Association in terms of an agreement made on the 15th March, 1923. This agreement appears to have been intended to prevent loss arising from keen competition between them and it provided amongst other things that some of the factories should at different times remain closed, while others should work under the direction of the Association in accordance with the terms of the agreement and that the Association should purchase ice from the different factories working at a certain rate per maund—this in the case of the Dilkusha Ice Factory was fixed at 12 annas per maund and in the case of others at not less than 10 annas per maund. It was further agreed that contracts for the supply of ice should be made for or on behalf of the Association at rates fixed by it from time to time and depots were to continue open at the non-working factories. Provision was made for the payment by the Association of the salaries of certain staff of the non-working factories. The profits arising from the sale proceeds of the ice after deducting the cost of the ice manufactured and other expenses of the Association were to be divided amongst the factories on consideration of their relative capacity according to certain shares specified in the agreement. It was provided that 10 per cent. of the profits were to be kept reserved to meet incidental expenses of the Association. An honorary Sale Commissioner and other officers were appointed.

4. The Association has since come to an end. Assessment has been made for 1924-25, both in the ordinary way on the profits of the Association for the previous year and under section 25 on the profits for the period after the expiry of that year. These profits were ascertained from a balance-sheet and profit and loss statement furnished by the Sale Commissioner showing the operations of the Association.

5. It is contended by the assessee, however, that no income-tax is chargeable on the profits of the Association in view of the fact that the Association was only a managing agency acting under the terms of the deed of agreement for the control and sale on a co-operative basis of the ice manufactured separately by all or some of the five ice factories and that it is not a separate partnership concern. It is further urged that as the Association had no capital of its own it could not be considered to be carrying on any business or earning any profits of its own. Further, it is argued that the profits of the Association did not constitute profits or gains of the business of the said Association liable to taxation and assessment under the Income-tax Act, but

constituted profits or gains of the business of the ice factories liable to taxation and assessment separately under the Act.

6. In order to determine the points of law which arise in connection with this reference it is necessary to refer to section 3 of the Indian Income-tax Act, 1922, by which income-tax is made chargeable in respect of all "income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals." It does not appear to be disputed that the Association worked generally in accordance with the agreement, and in view of the balance-sheet filed by the Sale Commissioner and the terms of that agreement it cannot seriously be contended that the Association did not make "profits." But it appears to be contended that such profits must in view of the nature of the agreement be regarded as profits of the several constituent firms (or individuals) and not of the Association and should have been assessed on this basis and not on the basis actually adopted. It is true that the agreement makes no provision specifically for capital or property belonging to the Association itself other than money receipts from sale, but the balance-sheet indicates that deposits were made by the various partners corresponding almost exactly to the shares in which the profits of the concern were to be divided. The agreement itself provides for the daily credit of sale proceeds to the bank account of the Association, for weekly payment for ice received and for the division of profits of the Association. The question is therefore not so much whether the Association had capital or profits as whether it had profits separately assessable under the Income-tax Act, 1922.

7. The only legal question therefore which it seems necessary to refer may be framed thus.

Was the Ice Association described in paragraph 3 above a firm within the meaning of section 3 of the Indian Income-tax Act whose income, profits and gains are liable to assessment to tax under the said Act?

This is in my opinion sufficient to include any legal question arising in this case necessary to determine the liability of the profits to separate assessment of income-tax. Other points such as the contention that it is a mere managing agency, that it had no capital and the like, are merely subsidiary and are sufficiently covered by the above question. If the Ice Association and its profits come within the scope of section 3 of the Act they will be separately assessable and if they do not, they will be assessable only as the profits of the constituents or individuals and for this reason the question as framed above appears sufficient to cover the only essential point of law raised in the case.

8. I have furnished Mr. Zahur Ahmad, the pleader of the assesseees, with a copy of paragraphs 3-7 of this note except that the issue in paragraph 7 was previously slightly differently framed and with a list of the documents which it is intended to submit with this, and I have also asked him to refer me to any ruling on the question of jurisdiction. The latter he has been unable to do. As regards the former, he does not press for the reference of any question beyond what has been stated above.

9. In order to determine the meaning of the word "firm" which is used in the Indian Income-tax Act it is desirable to refer to the Indian Contract Act. In that Act it is laid down that "persons who have entered into partnership with one another are called collectively a 'firm'" and 'partnership' is defined as "the relation which subsists between persons who have agreed to combine their property, labour or skill in some business and to share the profits thereof between them." Now, the use of the words "property, labour or skill" cannot be taken in any very narrow sense. It is certainly not necessary that partners should combine all their property in order to constitute a partnership, and the same consideration would appear to apply to the remainder of the words "labour or skill". These words again may well be taken as including such work of organisation as was actually to be performed by this Association. The parties were to hold a meeting in accordance with paragraph 4 of the agreement, to fix rates and prices and to adjust accounts and to determine other matters so that in

this way there was clearly a combination of "labour and skill." Then again the agreement was one of association for the purpose of doing business and sharing profits between the firms or individuals owning the constituent factories. This, I think, is the only rational interpretation that can be put upon it. Even if reference be made to paragraph 19 in which it is laid down that what was to be divided was the sale-proceeds of the ice after deducting the cost of the ice manufactured, I do not think that this can be understood as meaning anything other than doing business (by the sale of ice) and sharing profits arising therefrom. Paragraph 11 refers specifically to purchase of ice, and although these words are actually used only with reference to one of the factories, the agreement taken as a whole clearly provides for the purchase of ice by the Association from each of the constituent factories for the time being engaged in manufacture, for sale of that ice to the public either through the constituent factories or otherwise and for division of the profits between the different members of the Association in proportion to certain specified shares (with certain provisions for carrying some of the profits to a reserve for the incidental expenses). I may mention that in the balance-sheet there are shown deposits by the various constituent factories which are almost exactly in proportion to their shares. This would go very near to representing a combination of property (a term which must necessarily comprise funds also), but in any case there is clearly a combination of labour and skill. As regards the question whether the Association was actually doing business, apart from the fact that purchase and sale is essentially business, it may further be noticed that it is admitted by implication in the grounds of appeal before the Assistant Commissioner where it is contended in paragraph 2 that the Association had no authority to do any business except what was provided for in the agreement. This latter restriction applies to any company or firm which is constituted by any definite agreement or articles of association, but the language clearly shows that the Association was engaged in doing business, and a similar conclusion can be drawn from paragraph 6 of the present petition. The position therefore would appear to be that whatever profits or loss accrued in manufacturing the ice in one of the constituent factories and selling to the Association at the price fixed would be the profit or loss of that individual factory, while whatever profit was gained on the sale to the public of the ice after purchase from the constituent factories would be the profits of the Association, and this in its turn would be divided to the constituent individuals or firms. This Association does not appear in any essential way to differ from any partnership of individuals or firms; it is clearly a firm, and its profits are separately taxable under the Income-tax Act, 1922, as the profits of the Association.

10. I may notice incidentally that the question whether the profits in any way affect the assessment of individuals does not seem to come within this reference. The Income-tax Act itself makes provision for the fact that profits of a firm or company may be both income of the company as such and also when divided may be part of the income of the individuals constituting the company or the firm. But this does not appear to affect the matter. The Act itself makes provision to prevent this resulting in double taxation and provides for taxation in different ways of income derived, for example, from registered and unregistered firms, and the question involved in this case is not a question of what may ultimately happen to those profits but whether the profits are separately assessable as the profits of this particular Association. For this reason I have declined to add to the list of documents a copy of the assessment order of the Income-tax Officer of Bareilly in the assessment case of Seth Ramchand Lachhman Das, dated the 12th January, 1925, which the pleader for the applicants asks should be included amongst the documents. No mention of this has been made in the grounds of appeal before the Assistant Commissioner and, in my opinion, it is quite irrelevant to the present reference, which is on the point of law only.

11. The questions for determination by the Judicial Commissioner therefore appear to be the following :—

(1) Whether the Judicial Commissioner of Oudh has jurisdiction to hear references made under section 66 of the Indian Income-tax Act, 1922, in respect of firms

whose principal place of business is in Oudh ? and

(2) Was the Ice Association described in paragraph 3 above, a firm within the meaning of section 3 of the Income-tax Act, whose income, profits and gains are liable to assessment to tax under the said Act?

As regards No. (1), I am of opinion that the Judicial Commissioner of Oudh has jurisdiction to hear the reference, but the point does not seem to have been decided definitely, and it seems desirable that the Court should give a definite decision in the matter.

As regards No. (2), I am of opinion that the words cover such an Association as has here been dealt with so as to make the profits, if any, accruing to it, separately assessable as the profits of the Association under the Indian Income-tax Act, 1922.

DEED OF AGREEMENT.

This agreement made and entered into this 15th day of March, 1923, between Sheikh Amir Hasan Sahab, Proprietor, Victor Ice Factory, Lucknow, of the first part, Babu Ram Gopal Saheb, Manager of the Ramchand Lachman Das Ice Factory of the 2nd part, Mr. K. D. Seth, Manager of the Bhargava Ice Factory, Hazaratganj, Lucknow, of the 3rd part, Babu Kashi Pershad Saheb, Manager of the Karundia Industrial Development Co., Ltd., of the 4th part and Mr. Gardner, Proprietor of the Dilkusha Ice Factory, Lucknow, of the 5th part as representatives of the Victor, the Ramchand Lachman Das, the Bhargava Ice Factories, the Karundia Industrial Development Co., Ltd., and the Dilkusha Ice Factory, respectively, situated in Lucknow.

Whereas the parties hereto carry on the manufacture, business and trade of ice in Lucknow and do also carry on the trade and business of ice outside Lucknow in connection with the ice factories mentioned above situated in Lucknow and whereas the said parties are desirous of promoting and protecting their said trade and business and of facilitating the public interests and economising the working of such trade, manufacture and business and for that purpose have agreed in consideration of the mutual benefit and protection to be secured thereunder by them respectively, to enter into this agreement upon the terms and conditions hereinafter expressed and to form themselves into an Association called the Lucknow Ice Association with its Chief Office at Lucknow.

Now it is hereby agreed for the consideration aforesaid as follows:—

1. That the Association herein formed shall work in accordance with the terms of this agreement for two years at least from 1st April, 1923, to 31st March, 1925, and unless and until dissolved by the majority of the parties hereto or by a majority of the persons, firms or companies at any time parties hereto, this Association shall continue to work and operate for a further period of 2 years.

2. That a majority of the parties hereto or a majority of the persons, firms or companies, at any time parties hereto may at any time during the operation of this agreement, admit any person, firm or company engaged in the same trade, manufacture or business to the benefit of this agreement on such terms and subject to such conditions as the such majority shall think fit. Such persons, firms or companies shall on such admission execute an agreement then subsisting in execution of amendment of this agreement and shall hereafter be deemed the party hereto.

3. That the Association will have the entire control over the management of sales and distribution of the profits to the factories, and the proprietors or managers (as the case may be) of the respective factories shall be bound to assist the Association in making the work easy and more successful.

4. That the parties hereto shall hold a meeting as far as possible once in every month and oftener, if necessary, to manage the affairs of the Association, to fix rates and prices and adjust accounts and determine other matters arising out of this agreement, and the terms of this agreement may for the promotion of the purpose herein before set forth be amended or extended at any such meeting on any such terms as shall be approved or agreed by the majority present at such meeting in person or by proxy.

5. That the quorum necessary for the transaction of the business at a meeting of the Association shall consist of at least 3 of the parties to this agreement.

6. That if within half an hour from the time appointed for the meeting a quorum is not present the meeting if convened upon the requisition of the members shall be dissolved. In any other case it shall be fixed for some other day at suitable time and place.

7. That the questions arising at any meeting shall be decided by a majority of votes, each party to the agreement for two years at least having one vote. In case of equality of votes the Chairman of the meeting shall have a casting vote.

8. That at least for two years of this agreement Mr. K. D. Seth as Manager of the Bhargava Ice Factory shall work as a Chairman, Munshi Amir Hasan Saheb as Proprietor of the Victor Ice Factory shall work as an Honorary Sale Commissioner and Babu Ram Gopal Saheb as Manager of Ramchand Lachman Das Ice Factory shall hold the office of Honorary Secretary of the Association. Babu Kashi Pershad Saheb as Manager of the Karundia Industrial Development Co., Ltd., shall be the Honorary Auditor of the Association.

9. (a) That the Sale Commissioner shall also have a power of attorney on behalf of the Association the terms of which will be fixed afterwards by the parties concerned.

(b) That the parties to the Association shall cause proper minutes to be made of the proceedings of all meetings and of their own presence thereat respectively, and all orders and resolutions signed by the Chairman concerned shall be receivable as evidence in all legal proceedings.

10. That the Chairman elect shall preside at every meeting of the Association. If the Chairman is not present within 15 minutes after the time appointed for holding the meeting or if there is no such Chairman the parties present shall choose some one present from them to be a Chairman of such meeting.

11. That the Dilkusha Ice Factory will work in accordance with the directions of the Association throughout the first season at least and whatever ice be purchased from it by the Association will be paid at the rate of Re. 0-12-0 per maund. That for this first season (i. e., 1923-24) the Bhargava and the Victor Ice Factories and for the next season, 1924-25, Karundia Industrial Development Co. and Ram Chand Lachman Das Ice Factories will remain closed.

12. That subject to the terms regarding rates contained in clause 11 of this agreement the Association for two years at least will pay the cost of ice not less than ten annas per maund to the owners of the factories (excepting Dilkusha) and this sum will be paid weekly to the factory owners.

13. That subject to the terms contained in clause 11 of this agreement the Association shall have the power to work at any time any non-working factories at any time, being parties to this agreement, but their Engineer's pay will not be forfeited.

14. That hereinafter, future contracts for the supply of ice shall be made for and on behalf of the Association and the rates for the sale of ice shall also be fixed from time to time by the Association.

15. That during the season at the totally non-working ice factories, if necessary, depots for the sale of ice shall be maintained by the Association and 2 maunds of ice daily free of charge shall be given by the Association to every totally non-working factories.

16. That the salaries of the Engineers of the totally non-working factories and other staff necessary for carrying on the depots' work shall be paid by the Association. They will remain and will work under the control and supervision of the Sale Commissioner.

17. That the rates for the sale and disposal of ice shall be fixed from time to time by the Association.

18. That the the Sale Commissioner shall keep the accounts in English and for this purpose the necessary staff shall be provided to him by the Association. The accounts and books shall at any time remain open to any party for inspection and remarks. The accounts of the preceding month will be kept ready for audit before the 7th of each month.

19. That the sale-proceeds of the ice after deducting the cost of the ice manufactured and other expenses of the Association shall be divided amongst the parties, on the following basis proportionate to their capacity ; that is, according to the following shares allotted to each party :—

1.	Victor Ice Factory	8 capacity about (800) maunds.
2.	Lachman Das	„ 7 „ (700) „
3.	Bhargava	„ 2½ „ (275) „
4.	Karundia	„ 2½ „ (275) „
5.	Dilkusha	„ 1½ „ (150) „

Such profits shall be estimated and distributed during the term of this agreement as far as possible by the 15th of every month after passing the accounts by the parties at the monthly meeting of the Association. Ten per cent. of the profits will be kept reserved in Bank for meeting accidental expenses of the Association which shall be disposed off as the parties may decide at the expiry of the season. The above shares (in this para) are fixed for the year 1923-24, and they are liable to revision for the next year if the out-turn of the factory by working is proved to be more or less.

20. That the sale-proceeds will be sent to a reliable Bank which the Association may think fit, daily to be credited to the Association's account and that during the Bank holidays the sale-proceeds shall be kept by the Sale Commissioner in his own custody.

21. That the majority of the parties hereto shall have the power to put a stop to the working of any of the factory or factories (party to this agreement) by way of damages in case if there are three stoppages in the working of the factories.

22. That all disputes of any nature whatsoever and at any time between any of the parties to this agreement or any other agreement then existing in execution of amendment of this agreement or any other agreements arising out of the interpretation or operation of the agreement shall be decided by the members themselves and the decision of the majority shall be final and binding on the party or parties concerned.

23. That if in the opinion of the parties to the agreement any party or parties to this or other existing agreement does any act or makes any breach in contravention to the rules of the Association at any time during the term of the agreement the Association shall be at liberty to impose a penalty upon such party or parties not exceeding Rs. 5,000 for a single year and single breach ; and this penalty shall be realised from the profit of the share of the defaulting party.

In witness whereof we have set our hands the day and year first above written.

Bisheshar Nath Srivastava, for the assesseees.

The Government Advocate, for the Crown.

JUDGMENT.

WAZIR HASAN J:—This is a reference under section 66, sub-section (2) of the Indian Income tax Act, 1922, by the Income-tax Commissioner of the United Provinces of Agra and Oudh. The question of law which the Commissioner has referred to this Court for decision is stated in the reference as follows:—

“Was the Ice Association, described in paragraph 3 above, a firm, within the meaning of section 3 of the Indian Income-tax Act, whose income, profits and gains are liable to assessment to tax under the said Act.”

The Commissioner has answered this question in the affirmative and I am of the opinion that his answer is right.

It appears that on the 15th day of March, 1923 an agreement was made and entered into between two proprietors of two ice factories and three managers of three ice factories all situate in the city of Lucknow. In the preamble of this agreement the object of the Association formed thereby was stated to be the promotion and protection of the trade of ice business and of facilities to the public and also the economising of the working of such manufacture and business. The Association formed under this agreement was to work in accordance with the terms contained therein for a period of two years from 1st April 1923, to 31st March 1925. The Association thus formed was to have the entire control over the management of sales and distribution of the profits to the constituent factories, and the proprietors and managers of these factories were bound to assist the Association "in making the work easy and more successful." The parties to the agreement were to manage the affairs of the Association, to fix rates and prices and adjust accounts, and determine other matters arising out of the said agreement. On behalf of the Association, and under para 8 of the agreement, M. Amir Hasan, proprietor of one of the constituent ice factories was to work as an honorary Sale Commissioner. Rates for the sale and disposal of ice were to be fixed from time to time by the Association and the sale Commissioner was to keep the accounts and was provided with a staff to be paid by the Association. Paragraph 19 of the agreement provides for the distribution of the sale proceeds of the ice amongst the constituent factories in certain proportions. On an interpretation of these terms of agreement, I am clearly of opinion that the Association formed under this agreement is a firm within the meaning of section 3 of the Indian Income-tax Act of 1922, and as such, is liable to assessment under the same Act.

The reference before us also raises a preliminary question as to the jurisdiction of this Court to entertain this reference. In other words, the question is, whether this Court is a High Court within the meaning of section 66 of the Indian Income-tax Act of 1922. Section 8 of the Oudh Courts Act, 1925, runs as follows:—

"The Chief Court shall be deemed for the purposes of all enactments for the time being in force to be the highest Civil Court of Appeal and Revision."

This Court is the chief Court of Oudh under section 3 of the Oudh Courts Act, 1925. Section 4, paragraph 21, of the General Clauses Act, 1904, (United Provinces) defines "High Court" as follows:—"High Court used with reference to civil proceedings, shall mean the highest civil court of appeal in the part of the United Provinces in which the Act containing the expression operates." The Oudh Courts Act operates in the Province of Oudh in the United Provinces. I am, therefore, of opinion that the effect of the two enactments is to constitute this Court a High Court within the meaning of section 66 of the Indian Income-tax Act, 1922.

ASHWORTH J.—I agree. Certain manufacturing firms by means of an agreement formed a selling association to prevent under-selling by the constituent firms. One clause in the agreement provided for an article manufactured by the constituent firms being paid for at a fixed rate by the Association. It is alleged in argument that heavy losses were incurred by the constituent firms by manufacturing at this rate. In my opinion the Association was clearly a separate firm within the meaning of section 3 of the Income-tax Act. The reference has been made in a form which does not require this Court to decide the method of assessment, but it is apparently, from the arguments of Counsel for the Association, the method that the Association really objects to. There does not appear to me any reason why the profits of the Association should be held diminished by any losses of the individual firms.

BY COURT.

The answer of the Court to both questions asked in the reference is in the affirmative. Having regard to the provisions of section 66 (6), it is ordered that the Association shall bear the costs of this reference.

[145] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

[6th January, 1926.]

Tora Gul Boi

.. Assessee.

v.

The Commissioner of Income-tax, Punjab and N. W. F.
Province

.. Referring Officer.

Income tax Act (XI of 1922), Sec. 66—Assessment of resident in North West Frontier Province—Reference to Lahore High Court—Competency—"High Court," what is—General Clauses Act (1 of 1897), Sec. 2.

'The High Court' in section 66 of the Income-tax Act with reference to assessment of an assessee resident in North-West Frontier Province is the Court of the Judicial Commissioner of the North-West Frontier Province and not the Lahore High Court and consequently the latter Court has no jurisdiction to entertain a reference in connection with such an assessment.

Case [Referred Case No. 30 of 1925] referred by the Commissioner of Income-tax, Punjab and North-West Frontier Province, under section 66 (1) of the Income-tax Act (XI of 1922), with his letter No. 378, dated 9th July, 1925, for the opinion of the High Court.

CASE.

In the course of a petition for review pending before me an important question of law has arisen, and I therefore refer the point for decision to the High Court of Judicature at Lahore.

2. The question of law that has arisen is not a general question of principle, but a special question arising out of the circumstances of the particular case under consideration ; and it will be necessary therefore for me to state the facts of the case first and then to specify the questions referred to your Lordships for decision.

3. The facts of the case are as follows :—

In the year 1919 the assessee concerned, Tora Gul Boi, and other persons, who were residents and merchants of Bokhara, travelled to Europe *via* India with a large number of valuable furs entrusted to them by the Amir of Bokhara for sale in Europe. The furs are said to have been sold in 1919 and 1920 and the sale proceeds, amounting approximately to 16 lacs of rupees in Indian money, were first deposited with Messrs. Cox & Co., in England, and subsequently transferred to India by this firm. The assessee and his companions returned to India in March or April 1921, and it is understood that the remittance of the 16 lacs to India took place about the same time. On arrival in India the assessees travelled up-country to Peshawar. By this time the Bolsheviks had over-run Bokhara, and the Amir of Bokhara had fled from his country and taken refuge in Kabul. In view of the state of things in Bokhara, Tora Gul Boi, the assessee, decided not to continue his journey back to Bokhara but to take up his residence temporarily at Peshawar in British India. It is understood that at this time the 16 lacs of rupees, the sale price of the furs sold in Europe, were held by Messrs. Cox & Co., at the order of the assessee.

At this stage the Amir of Bokhara then residing in Kabul claimed the whole of the sale proceeds of the furs as his property, and on the 24th March, 1922 instituted a suit in the Court of the District Judge of Peshawar against Tora Gul Boi and his companions for rendition of accounts in respect of the sale proceeds of the furs in question. The plaint stated that the defendants, chief of whom was the present assessee, Tora Gul Boi, had taken certain furs belonging to the plaintiff to England for sale and after selling them had retained the sale proceeds in their possession. The plaintiff, therefore, prayed that the defendants should be ordered to render accounts of the sale of the plaintiff's goods and of the profits realised by the sale and asked for a decree with costs against the defendants for the sum found due to the plaintiff after deducting the necessary expenses. Pending the decision of the suit the plaintiff asked

for and apparently obtained an injunction from the Court restraining Messrs. Cox & Co., from paying the money in dispute to the defendants until the decision of the suit. The pleas submitted by the defendants included among other matters an admission that furs had been taken from Bokhara to England by the defendants and sold for approximately 16 lacs of rupees. It is urged, however that the furs were not the property of the plaintiff as an individual but in his capacity as the ruler of Bokhara, and it was urged that a change in the Government of Bokhara had occurred and that defendants were responsible, after deducting their expenses and commission, to account for the money to the Government of Bokhara and not to the plaintiff personally. It was further urged that the *de facto* Government in Bokhara claimed the sale proceeds of the furs sold in Europe as belonging to that Government, and to enforce their claims thereto, it was alleged that the said *de facto* Government in Bokhara had seized all the property of the present assessee, Tora Gul Boi, in Bokhara. The defendants further claimed that they were entitled to deduct from the sale proceeds, first all expenses incurred by them in connection with the venture and secondly their customary commission on the sale of the furs.

Shortly after the institution of the suit a compromise was arrived at between the parties to the suit and duly executed at Kabul on the 14th April, 1923 by the plaintiff and the agents of the defendants. By this compromise it was agreed that out of the sum of approximately 16 lacs deposited with Messrs. Cox & Co., eight lacs would be given to the plaintiff, the Amir of Bokhara, five lacs would be set aside for the benefit of the State of Bokhara, two lacs would be given to Tora Gul Boi as his commission, and Rs. 60,000 and Rs. 40,000 to the other two defendants respectively as their commission. As a result of the compromise a decree was passed by the District Judge, Peshawar, on the 24th day of April, 1923 in favour of the plaintiff against the defendants in which the Court ordered that in accordance with the compromise effected the defendants should pay to the plaintiff the sum of eight lacs of rupees.

4. The question of law that I now desire to refer to your Lordships is as follows:—

"Did the decree of the District Judge at Peshawar, dated the 24th April, 1923, deciding the suit in accordance with the deed of compromise executed at Kabul on the 24th April 1923, result in the receipt by the assessee, Tora Gul Boi, of the sum of two lacs of rupees on the date either of the compromise or of the judgment?"

5. Before proceeding to discuss the actual point of law for decision, I would refer in passing to other aspects of the case to make it clear that it is only if the decision of the suit can be held to have caused the receipt of the sum of two lacs of rupees by the assessee, Tora Gul Boi, that this sum could be assessed to income-tax in British India. It is clear that up to that stage the assessee's remuneration in respect of the transaction had not been determined, but even if it be held that from the first moment that the sale proceeds came into the assessee's hands he was entitled to retain definitely for his own use a proportion of the said proceeds as his commission, such initial receipt took place in the United Kingdom. The proceeds were no doubt remitted to British India to be held at the disposal of the assessee at about the same time that the assessee himself reached India on his return journey, but such remittance to the assessee in British India, or the bringing by assessee into British India of the sale proceeds cannot make the assessee's share of the proceeds assessable under section 4 (2) of the Income-tax Act, inasmuch as the assessee could not at that time be described as a person resident in British India. The assessee's residence in British India undoubtedly commenced from the time when after reaching Peshawar on his return journey he decided to take up his residence in British India temporarily until conditions in Bokhara were such as to permit of his returning there in safety.

6. I find it very difficult to express an opinion on the question of law specified in paragraph 4 of the reference. On behalf of the assessee it is argued that under sections 217 and 219 of the Indian Contract Act an agent is entitled from the start to

deduct from the sale proceeds received by him for goods sold on behalf of his principal any sum due to him by way of expenses or commission. On the other hand, it is perfectly clear that it was not until the execution of the compromise at Kabul and the decision of the suit, both of which events took place in April, 1923, that the assessee's remuneration was determined. The wording of the original compromise which is in Persian is as follows. * *

I am not acquainted with the Persian language myself but I understand that in the sentence quoted the future tense is used, and the meaning is that two lacs shall be given to Tora Gul Boi, as his commission. In paragraph 12 of his plea in the suit the assessee had claimed that his commission should be one-third of the total sale proceeds, and, as by the compromise he accepted one-eighth of the total proceeds, it appears clear that the commission had not been determined prior to the suit, and that although the whole sale proceeds were lying with Messrs. Cox & Co., at the order of the assessee, it was not until the decision of the suit that he had a legal right definitely to appropriate to his own individual use any specified portion of those sale proceeds. The wording of the deed of compromise appears to make it clear that it is only on execution of the compromise and the decision of the suit that the assessee is to enter into the enjoyment of his two lacs of rupees. As a result of the compromise a decree was passed by the Court on the 24th April, 1923. The judgment of the Court on that date is to the effect that "the said compromise be recorded and a decree be passed in accordance therewith under Order 23, Rule 3." As the actual control of the whole sum of money was at that time in the hands of the assessee subject to the injunction issued by the Court to Messrs. Cox & Co., restraining them from paying out the money to the assessee until the decision of the suit, the form that the decree took was a simple money decree in plaintiff's favour for eight lacs of rupees to be paid to the plaintiff by the defendants according to the compromise, but the compromise had by the order of the presiding judge been recorded in Court and the decree must be read in conjunction therewith. My opinion, therefore, is that the decree of the Peshawar Court, dated the 24th day of April, 1923, amounted to the receipt by the assessee, Tora Gul Boi, on that day of the sum of two lacs of rupees, and as that date fell within the accounting period ending the 31st March, 1924, I am of opinion that this sum of two lacs of rupees has been correctly included in the income of the assessee, Tora Gul Boi, for the accounting period ending the 31st March, 1924, and assessed to income-tax for the financial year 1924-25.

7. Copies of all documents necessary for the decision of this reference as specified in the appendix attached to this reference are forwarded herewith.

Aziz Ahmad, for the assessee.

Carden Noad, Government Advocate, for the Crown.

JUDGMENT.

This is a reference from the Commissioner of Income-tax under section 66 of the Income-tax Act, and the first question is whether this Court has jurisdiction to entertain it, the point referred having arisen in connection with an assessment made on a person residing in Peshawar in the North-West Frontier Province.

A reference under section 66 has to be made to the High Court and Mr. Aziz Ahmad on behalf of the assessee contends that the term "High Court," which is not defined in the Income-tax Act should be taken in its ordinary sense, and that as the same Officer is Commissioner of Income-tax both for the Punjab and for the North-West Frontier Province, the reference was rightly made to this Court.

Although the Commissioner for the two Provinces is the same person, he was appointed by a separate notification for each Province (*Gazette of India* Notification Nos. 5551 and 5553 of the 20th November, 1924), so that in making the reference he has erroneously described himself as "Commissioner of Income-tax, Punjab and North-West Frontier Province." In dealing with the assessment of the petitioner he was acting in his capacity as Commissioner for North-West Frontier Province, and we

do not see how in such capacity he was competent to make a reference to a High Court of another Province. In section 3 of the General Clauses Act, 1897, it is stated that "High Court" used with reference to civil proceedings shall mean the highest Civil Court of Appeal in the part of British India in which the Act or Regulation containing the expression operates. The present proceedings are, in our opinion, civil proceedings, and the High Court would, therefore, in connection with them, be the Judicial Commissioner of the North-West Frontier Province and not the Lahore High Court.

We hold that this Court has no jurisdiction to entertain the reference and we direct that it be returned to the Commissioner of Income-tax. We leave the parties to bear their own costs.

NOTE.

[By Act XXIV of 1926, section 66 of the Act has since been amended by the insertion of a definition clause (8), under which "the High Court" for the purposes of the said section means, in relation to the North-West Frontier Province and British Baluchistan, the High Court of Judicature at Lahore.—ED.]

[146] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

[6th January, 1926.]

Messrs. Nanak Chand Fateh Chand

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab, and North-West Frontier Province

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (11), (b) and 22—Assessee starting business on 18th April, 1923—Notice calling for return for previous year ending with financial year—Return for full 12 months by assessee—Previous year, determination by Commissioner—Assessment on basis of return.

The assessee, a firm which commenced business on the 18th April, 1923, in compliance with a notice issued by the Income-tax Officer in April, 1924, calling for a return of its total income for the previous year ending with the 31st March, 1924, submitted a statement of its profits for a period of 12 months from the 18th April, 1923, to the 17th April, 1924. Thereupon on the motion of the Income-tax Officer, the Commissioner of Income-tax acting under Sec. 2 (11) (b) of the Income-tax Act determined the full period of 12 months, for which the return was submitted, as the previous year for the purposes of the assessment and an assessment was levied for the year 1924-25 on the basis of the return. The assessee contended that the above determination of the previous year by the Commissioner was illegal and that it was not liable to be assessed as it was not in existence for a complete year before the 1st April, 1924.

Held, that the determination of the previous year by the Commissioner was legal and justified by the instructions of the Central Board of Revenue and that the assessment based on the profits of the previous year ending with the 17th April, 1924, was valid.

Case [Case No. 41 of 1925] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Punjab and N. W. F. Province, with his letter No. 505—J.M.—495, dated the 2nd September, 1925, for the opinion of the High Court.

CASE.

By petition dated the 26th May, 1925, under section 66 (2) of the Income-tax Act I am requested by the firm of Messrs. Nanak Chand Fateh Chand of Katra Hari Singh, Amritsar, to refer for the decision of the Hon'ble Judges of the High Court of Judicature at Lahore two questions of law arising out of the appellate order under section 31 of the Act passed by the Assistant Commissioner, East Punjab Division, on the 27th April, 1925.

2. The questions of law as set forth in the petition are as follows:—(a) Whether the sanction accorded by the Commissioner for assessing the petitioner is not illegal

* (1926) I.L.R. 7 Lah. 223 ; 27 P.L.R. 405; A. I. R. (1926) Lah. 421; 96 Ind. Cas. 368.

and opposed to law, as clause 2 (11) (b) (*sic*) has no application to the case. (b) Whether the law permits the Department to levy an assessment during the first year of the working, when a new business is started and registered before the Income-tax Officer.

3. By my order, dated the 13th July, 1925, I found that question (b) as set forth above did not arise in this case, as, far from an assessment having been made during the first year of the working of the business in question, the first assessment was made when the firm had been in existence a little over a year and nine months and was based on the profits of the first complete year of the firm's working.

In the same order I also found that question (a) was so definitely answered by the provisions of the Income-tax Act, that, in order to save the assessee the expense of a reference to the High Court, I gave them an opportunity of appearing before me to enable me to explain the position with a view to their withdrawing their petition. A hearing was given on the 29th July at Lahore. Unfortunately the assessee did not employ the services of a legal practitioner who would have understood the legal position and explained it to his clients, and as the clients have not withdrawn their application I have no option but to make the reference.

4. The facts of this case are as follows:—

On the 18th April, 1923, the assessee's firm registered themselves in the office of the Income-tax Officer, Amritsar, in accordance with the provisions of section 2 (14) of the Income-tax Act, and commenced business on that date. On the 31st March, 1924, the firm had been operating for 11 months and 13 days in the financial year then closing, and in April, 1924, accordingly the Income tax Officer, Amritsar, under the provisions of section 22 (2) of the Act issued a notice to the firm requiring them to furnish a return of their total income during the previous year, that is, during the 12 months ending the 31st March, 1924. In response to this notice the firm, instead of declaring its profits for the 11 months and 13 days ending the 31st March, 1924, submitted a memorandum of its profits for a complete period of 12 months up to the 17th April, 1924. At the end of this memorandum the assessee firm made a claim that no tax should be charged for the assessment year 1924-25 as the shop was new and started on the 18th April, 1923, after the commencement of the previous year as defined in section 2 (11) (a) of the Act. Such a claim is founded on no provision of law, and the Income-tax Officer commenced assessment proceedings according to law,

5. Normally it was the duty of the Income-tax Officer to assess the firm to income-tax on the actual profits accruing in the 12 months ending the 31st March, 1924, during which period the assessee firm as shown above had been doing business for 11 months and 13 days and had therefore earned almost a full year's profits. But in as much as the firm had made up its accounts for a full 12 months ending the 17th April 1924, the Income-tax Officer took steps to have this full period of 12 months determined as the "previous year" for the purposes of assessment in accordance with the provisions of section 2 (11) (b) of Act. The facts were reported to the Commissioner and the Commissioner, by formal order dated the 6th November 1924, duly recorded as passed under section 2 (11) (b) of the Act, sanctioned an accounting period running from the 18th April.

6. It is this order of the 6th November 1924 that the assessee requested the Hon'ble Judges of the High Court to declare to be illegal on the ground that section 2 (11) (b) has no application to the case. It is difficult to follow the assessee's line of reasoning. Section 2 (11) (b) very clearly lays down that the expression "previous year" means "such period as may be determined by the Central Board of Revenue or by such authority as the Board may authorise in this behalf". In paragraph 5 of the Notes and Instructions issued by the Central Board of Revenue as Part III of the Income-tax Manual, printed on page 78 of the Manual, the Board lays down that "The Board of Inland Revenue (now known as the Central Board of Revenue) has authorised the Commissioner of Income-tax in each Province to determine as the

'previous year' in the case of any person, business or company, or class of person, business or company,

(a) a commercial year which may consist of more or less than 12 months, provided that no commercial year which may extend to less than 11 or more than 13 calendar months in any one year shall be so determined ; and

(b) a commercial year terminating after the end of the previous financial year, provided that no commercial year terminating later than one month after the end of the previous financial year shall be so determined. "

I have quoted the passage from the instructions of the Central Board of Revenue *in extenso* as the assessee firm appears to make the astonishing claim that the sub-clauses (a) and (b) in the above passage are not two different alternatives referring to two entirely different hypothetical cases, but must both apply to a particular commercial year before the Commissioner can determine it as the previous year in question. The assessee firm argues that while a Commissioner is invested by the Board with authority to determine as the "previous year" a commercial year running from April 18, 1923 to April 20, 1924 [thus fulfilling both condition (a) and condition (b)] the Commissioner has no power to sanction a commercial year running from the morning of April 18, 1923 to the evening of April 17, 1924 (condition (b) only), or a commercial year running from March 25, 1923 to March 31, 1924 (condition (a) only).

7. I would respectfully submit to the Hon'ble Judges that the "previous year" determined by my predecessor's order, under section 2 (11) (b), dated the 6th November, 1924 in this case, falls definitely within the scope of sub-clause (b) in the instructions issued by the Central Board of Revenue under the authority vested in the Board by section 2 (11) (b) of the Income-tax Act, and that therefore the answer to the question (a) set forth in paragraph 2 above is in my opinion as follows :—The sanction accorded by the Commissioner in his order, dated the 6th November, 1924 for assessing the petitioner in the financial year 1924-25, on the profits accruing during the commercial year ending the 17th April, 1924 is entirely legal and in accordance with the strict provisions of section 3 of the Indian Income-tax Act (XI of 1922) read with section 2 (11) (b) of the said Act.

Lala Jagan Nath Agarwal, for the assessees.

Carden Noad, Government Advocate, for the Crown.

JUDGMENT.

This is a reference under section 66 (2) of Indian Income-tax Act, XI of 1922, by the Income-tax Commissioner, Punjab.

The assessee firm commenced business on the 18th of April, 1923. In April 1924 the Income-tax Officer required the firm to furnish a return of its total income during the previous year, i.e., during the twelve months ending the 31st of March 1924. In compliance with this notice the firm instead of declaring its profits for the 11 months and 13 days ending the 31st of March, 1924 submitted a statement of its profits for the period of 12 months, 18th of April, 1923 to 17th of April, 1924, and contended that it was not liable to pay income-tax for the year 1924-25 on the ground that the business had not been in existence for a complete year before the 1st of April, 1924. In other words, the assessee's contention was that the firm was not liable to pay income-tax either in respect of the 11 months and 13 days ending on the 31st of March, 1924, or for the whole year beginning 1st of April, 1924 and ending 31st of March, 1925.

Admittedly no income-tax is recoverable from the firm in respect of the period 18th of April, 1923 to 31st of March, 1924, nor has it been assessed to income-tax in respect of that period, and the contention that no income-tax is payable in respect of the period 1st of April, 1924 to 31st of March, 1925 is not only absurd but is founded on no provision of law. In our opinion the Income-tax authorities would have been

justified in assessing for 1923-24 on the profits realised during the 11 months and 13 days of 1923-24. It is true that for the first fortnight of 1923-24 the firm made no profits, because it was not in existence, at any rate, was not working; none the less the profits realised during that broken period were the profits realised in the course of the whole year 1923-24.

The Income-tax authorities, however, did not adopt this course but in accordance with the provisions of section 2 (11) (b) of the Act accepted as the accounting period the time from 18th of April, 1923 to 17th April, 1924. Before us it is contended that this course was unjustified inasmuch as that period (18th of April, 1923 to 17th of April, 1924) cannot be called a commercial year. The contention appears to us to be futile. There is no definition of the expression "commercial year" in the Act and we hold it to mean any period for which the accounts of the concerned are made up, and such period, provided it satisfied the conditions laid down by the Central Board of Revenue, may be deemed to be the previous year on which the assessment of any given year is based.

We consider that the previous year determined by the Commissioner of Income-tax is justified by the instructions of the Central Board of Revenue and his action is entirely legal. The costs of these proceedings shall be paid by the objecting firm. Counsel's fees, Rs. 100.

[147] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

[11th January, 1926.]

Benarsi Das Assessee.*

v.

The Commissioner of Income-tax, Punjab and North-West Frontier Province.

Income-tax Act (XI of 1922), Sec. 66 (3)—Failure of assessee to produce accounts demanded by Assessing Officer—Application to Court for stating a case, if lies.

Where the assessee failed to comply with the Assessing Officer's demand for production of accounts and consequently had no right of appeal against the assessment, no application by him would lie to the High Court under section 66 (3) of the Income-tax Act for an order directing the Commissioner of Income-tax to state a case.

Civil Miscellaneous Application No. 543 of 1924 under section 66 (3) of the Income-tax Act, XI of 1922, for an order calling upon the Commissioner of Income-tax to state a case for the opinion of the High Court.

Moti Sagar and Jagan Nath Agarwal, for the assessee.

Carden Noad, Government Advocate, for the Crown.

JUDGMENT.

LEROSSIGNOL J.:—The petitioner assessee applied to this Court for the issue of a mandamus to the Income-tax Commissioner to state a case. The power of this Court in this class of proceeding is defined in section 66 (3) of the Income-tax Act of 1922, and this Court may be moved under section 66 (3) only when the assessee is competent to apply to the Commissioner under section 66 (2).

Now the assessee in this case was debarred from making such an application to the Commissioner, for the reason that he had failed to comply with the Assessing Officer's demand for accounts and consequently had no right of appeal. For the foregoing reasons, we hold this petition to be incompetent and we dismiss it with costs.

*(1926) I.L.R. 7 Lah. 226; 27 P.L.R. 411; A.I.R. (1926) Lah. 400; 96 Ind. Cas. 382,

[148] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[11th January, 1926.]

The Commissioner of Income-tax, Madras

.. Referring Officer.

v.

The Thevara Patasala, by Manager, Arunachalam Chettiar ...

Assessee.*

Income-tax Act (XI of 1922), Secs. 4 (3) (i) and 10—Money set apart for Patasala—Investment in rice mill—Income devoted to upkeep of Patasala—Assessment of profits of mill—Exemption claimed as income of charity—If income derived from property under trust.

Under an agreement entered into at a partition of joint family properties, a sum of Rs. 15 000 was set apart for the establishment of a Thevara Patasala, a portion of the said amount to be utilised for the construction of Patasala buildings and the balance to be invested in purchase of lands whose income was to be used for its upkeep and maintenance. A Patasala was accordingly established in a building constructed at a cost of Rs. 4,000, but the balance of the trust amount, instead of being expended in the purchase of lands, was invested in a rice mill on behalf of the Patasala. On an assessment of the Patasala in respect of its income derived from the profits of the mill, exemption was claimed under Sec. 4 (3) (i) of the Income-tax Act, as income derived from property held under trust wholly for religious or charitable purposes.

Held, that the income sought to be assessed was profits of a business and not 'income derived from property' held under trust coming within the exemption in Sec. 4 (3) (i) of the Act and that the proceeds derived from the carrying on of the rice mill were therefore assessable in the name of the Manager of the Patasala.

In the matter of Lachman Das Narain Das, 1 I.T.C. 378 and *Coman v. Governors of the Rotunda Hospital*, (1921) 1 A.C. 1. Followed.

Case [Referred Case No. 11 of 1925] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Madras, in his letter No. 524 of 1925, dated 22nd April, 1925, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following question, which has arisen in assessing to income-tax the above institution for the year 1924-25.

"Whether the income derived by the Thevara Patasala from its rice mill business is income derived from "property held under trust" within the meaning of section 4 (3) (i) of the Indian Income-tax Act, XI of 1922."

2. The history of this institution which is a school for teaching Tamil hymns is as follows. In the partition of a Hindu joint family consisting of Chokkalingam Chettiar, Arunachalam Chettiar (the present manager of the institution) and Sabhapathi Chettiar a sum of Rs. 15,000 was set apart for establishing a Thevara Patasala. The relevant portions of the family partition deed (which is in Tamil) containing this stipulation read: "Out of the outstandings collected from the cloth trade, a sum of Rs. 15,000 should be set apart within three years; a portion of it should be spent on constructing a proper building for establishing a Thevara Patasala and the balance invested in the purchase of lands from the income of which the Patasala should be run and the boys taught Thevaram, etc., and certain gurupujas should also be performed. The management of the institution and the maintenance of accounts for receipts and expenditure, should be in charge of Arunachalam Chetty of our family". In accordance with this desire a building was constructed at a cost of about Rs. 4,000 and a Thevara Patasala established. Instead of investing the balance of the sum set apart for this Patasala in lands according to the terms of the partition deed, the founders

* (1926) 51 M.L.J. 123; 24 L.W. 183; (1926) M.W.N. 626; 96 Ind. Cas. 957; A.I.R. (1926) Mad. 949.

purchased a rice mill and carried on the business of milling rice on behalf of the Patasala. The profits from this rice mill during the year 1923-24 on which the present assessment is based amounted to Rs. 5,811. The Patasala claims exemption from taxation on its income from the rice mill, on the ground that it is income derived from "property held under trust for charitable purposes" within the meaning of section 4 (3) (i).

3. To come within the exemption clause 4 (3), two conditions have to be satisfied, viz., (a) the income must be derived from property; (b) it must be held under trust or other legal obligation for religious or charitable purposes. In my opinion neither of these conditions is satisfied in the present case.

(a) The income in question in this case is derived not from "property" but from "business." I do not consider that the word "property" in section 4 (3) (i) is there used in such a wide general sense as to include "business". I am fortified in this view by the ruling of the Allahabad High Court in *In the matter of Lachman Das Narain Das* (1).

(b) I do not think that the agreement set out in para. 2 above is sufficient to constitute a legal trust. It appears to me to be purely a private arrangement which the parties could cancel whenever they chose. I am therefore of opinion that the profits of the rice mill are not exempt from income-tax under section 4 (3) (i).

V. Ramaswamy Iyer, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.*

The facts in this case are quite sufficiently set out in the case stated by the Commissioner, and they are shortly these, that a Hindu joint family entered into a partition and agreed among themselves that Rs. 15,000 of the family property should be set aside for a trust purpose, which purpose was to establish a Thevara Patasala, that is, a school for teaching Hindus Tamil hymns, and that the income from the balance of the amount after erecting a building was to be used for the upkeep and carrying on of the school. The direction was that that balance was to be invested in the purchase of lands and that it was on the income arising from those lands the Patasala should be run. Now in these circumstances we entertain no doubt that there was a creation of a perfectly valid trust and one from which none of the parties or its members could possibly have resiled without committing a breach of trust. The question now arises in consequence of what the trustees did. Instead of investing the balance after the building of the school in lands, they in some shape or form invested them in a rice mill; apparently they purchased it and they carried on there the business of milling rice and derived income from it. The point taken by the Crown is that on that income they are liable to be taxed as being the profits of the business. It is quite clear to our minds that if they are the profits of a business they cannot at the same time be income derived from property held under trust wholly for religious or charitable purposes. The question was at first sight a little complicated by the fact which appears purely clear on the face of the document that this was a forbidden investment and that to put the money into this rice mill was a clear breach of trust on the part of the trustees. But the answer of the Crown appears to be on reflection that even assuming it to be a breach of trust, that is a matter which raises questions, no doubt, as between the *cesti qui trust* and the trustees and it may be that the trustees will not be able to charge the institution with any part of the profits that is taken from them by the Crown in the form of taxes. On that we express no opinion. But it does not in the least affect the position. The English authorities are quite clear that if an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition with other

* The judgment of the Court was delivered by the Hon'ble the Chief Justice.

(1) 1 I. T. C. 378; 47 All. 68.

persons who have to pay income-tax, they like them will have to pay income-tax, notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object. In our opinion, that is clearly laid down in the *Rotunda Hospital Case*, *Coman v. Governors of the Rotunda Hospital*, (1) which has been followed in the subsequent cases, and only the other day in *In the matter of Lachmandas Narain Das* (2). We think that principle applies quite clearly to the Indian Act as the Allahabad High Court holds and that the answer to this reference must be that the proceeds derived from the carrying on of this rice mill are assessable to income-tax. The person whom we declare to be assessable and whom we make to pay the costs of this reference including a pleader's fee of Rs. 150 is the Manager, Arunachalam Chetty.

[149] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[11th January, 1926.]

The Commissioner of Income-tax, Madras . . . Referring Officer.
v.
R. Sundaresa Aiyar . . . Assessee.

Income-tax Act (XI of 1922), Secs. 22 (2), and (4), 23 (2) and (4) and 34—Assessee not producing accounts—Assessment on estimated income—Concealment of particular sources of income—Notice under Sec. 34 for re-opening assessment—Grounds therefor, if to be specified.

The assessee, a silk merchant, was assessed for the year 1922-23 under Sec. 23 (4) of the Income-tax Act on an estimated income of Rs. 4,500, on failure to respond to notices for production of accounts under Secs. 22 (4) and 23 (2) of the Act. During the assessment proceedings for the succeeding year, the Assessing Officer found on an examination of the accounts for that year, that the assessee had been concealing the profits of his silk and cloth trade in his dyeing account. Thereupon the assessee was served with a notice under Sec. 34 calling on him to give a true and correct statement of his income for the year 1921-22 and to produce his accounts for that year. The notice did not particularise the details of the income believed by the Officer to have escaped assessment, nor was the form prescribed under Sec. 22 (2) enclosed therewith. The assessee did not comply with this notice and contended that no revised return could be called for in respect of a completed assessment. The objection was overruled and an assessment was made under Secs. 34 and 23 (4) on an estimated income of Rs. 29,000.

Held, (1) that an assessment already made under Sec. 23 (4) could be re-opened by the Income-tax Officer under Sec. 34 on the sole ground that there had been an under-assessment in respect of particular sources of income, and

(2) that a notice under Sec. 34 need not specify the detailed grounds on which the assessment was proposed to be re-opened.

Case [Referred Case No. 13 of 1925] stated under section 66 (1) and (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Madras, in his letter No. 497 of 1925, dated the 27th May, 1925 for the opinion of the High Court.

CASE.

The essential facts of this case are as follows. One R. Sundaresa Ayyar, a silk merchant of Kumbakonam, was assessed to income-tax for the first time in the year 1922-23, i.e., he was then called upon to send in a return of the income he had earned during the year 1921-22. He returned an income of Rs. 2,000 from business (details were not given) and Rs. 90 from property. He did not respond to the notice under sections 22 (4) and 23 (2) calling upon him to produce his accounts and prove his return. He was therefore assessed by the Revenue Divisional Officer, Kumbakonam,

under section 23 (4) for 1922-23 on an estimated income of Rs. 4,500, Rs. 1,500 from silk trade in Kumbakonam, Rs. 1,200 from a cloth shop at Valangiman, Rs. 1,400 from a printing press and Rs. 400 from house rent. As the assessment was made under section 23 (4) these details were not communicated to the assessee, no written order being required under the Act when an assessment is made under that subsection. During the assessment for 1923-24 Sundaresa Ayyar produced his accounts and was assessed on an income of Rs. 7,601 from business and Rs. 170 from property. While examining these accounts the Revenue Divisional Officer discovered that Sundaresa Ayyar had been concealing the profits of his silk and cloth trade in his dyeing account. The full accounts relating to the dyeing portion of his business were not produced, there being in the books disclosed to the Revenue Divisional Officer only one impersonal ledger relating to the dyeing transactions. When the manufactured articles were taken over to their respective accounts they were valued at figures higher than the actual cost of production. The profit thus made was not brought to profits and loss account but was concealed in the dyeing account. The Revenue Divisional Officer, therefore, for the assessment of 1923-24 estimated the profit from dyeing at Rs. 4,000 and mentioned the point specifically in his assessment order, dated 31st January, 1924. Sundaresa Ayyar, though he appealed against other points in this assessment order, never questioned the correctness of the decision of the Revenue Divisional Officer that profits had been concealed in the dyeing account. In the light of his discoveries in the 1923-24 assessment the Revenue Divisional Officer came to the conclusion that the estimate which had been made in the previous year must have been much below the true figure. He accordingly took action under section 34 and on 31st March 1924 served upon the assessee a notice calling upon him to give a true and correct statement of his total and taxable income for the year 1921-22 and to produce his accounts for that year. The notice, it is admitted, did not particularise the details of the income which were believed to have escaped assessment, nor was the form prescribed under section 22 (1) enclosed. Section 34 does not require that such a form should be served on the assessee. It simply says that the notice may contain all or any of the requirements included in the notice under section 22 (2). The petitioner did not reply to this notice. The Income-tax Officer reminded him personally on several occasions and on 16th October, 1924, issued another notice calling on the assessee to show cause in writing in three days why the Income-tax Officer should not proceed to re-assess him under sections 34 and 23 (4) to the best of his judgment and recover the excess tax due on the income that escaped assessment in 1922-23. In reply to this notice the assessee on 31st October 1924 put in a petition denying his liability to be assessed under section 34, maintaining that the Income-tax Officer had no power to call for a revised return in respect of a completed assessment and that the reasons for the Income-tax Officer holding that he was under-assessed were not given in the notice. The Income-tax Officer considered the objections invalid and made an assessment under sections 34 and 23 (4) for the year 1922-23 on an estimated income of Rs. 25,000 from trade in kora silk, dyed silk, dyeing factory, etc., and Rs. 400 from property. Again these details were not communicated to the assessee because the order was passed under section 23 (4) and not under section 23 (3). Against this assessment Sundaresa Ayyar appealed to the Assistant Commissioner. The Assistant Commissioner considered that an appeal lay even against an assessment made under section 23 (4) if the assessee was denying his liability to be assessed and accordingly admitted the appeal and passed an order holding that a part of the income of Sundaresa Ayyar had escaped assessment and that he was liable to be re-assessed under section 34.

2. Sundaresa Ayyar then put in an application to me under section 66 (2) asking for a reference to the High Court.

3. Before I discuss the points on which Sundaresa Ayyar claims a reference, I desire under section 66 (1) to refer the following question for the opinion of the High Court, viz.,

"In the circumstances of this case, had Sundaresa Ayyar any right of appeal to the Assistant Commissioner under section 30 (1)." *

In my opinion the proviso to section 30 (1) bars the right of appeal in respect of any assessment which has been made under section 23 (4). That is, I hold that if an assessee fails to comply with the preliminary notices issued to him he loses his right of appeal and the other rights contingent on the appeal. If my interpretation of the proviso to section 30 (1) is correct, then the order passed under section 31 by the Assistant Commissioner is one made without jurisdiction and I should therefore have to set it aside in the exercise of my powers under section 33; in which case, in my opinion, the assessee would not be entitled to ask for any reference under section 66 (2) because that section confers the right to demand a reference only in respect of points arising out of orders under section 31 or section 32. I have discussed this question with the assessee's representative. He argues that the proper construction of the proviso to section 30 (1) is that it limits the right of appeal on the question of the amount or rate but not on the question of the liability to be assessed. I can find no justification for this interpretation of this proviso. I can see no essential difference between the case of a man who believes his income to be Rs. 1,800 and therefore not assessable and the case of the present assessee who pretends to believe that the notice issued to him was invalid and that the assessment for 1922-23 could not be revised. In both cases the Income-tax Officer has, I submit, jurisdiction to make the preliminary enquiry. The two questions of fact—in the one case whether there is an income of over Rs. 2,000 and in the other case whether there was some income which escaped assessment—can only be properly determined if the assessee replies to the notices and place materials before the Income-tax Officer.

4. Turning now to the assessee's application, which, I submit, need only be considered if your Lordships decide the first point against me, the assessee's Vakil, after discussion, has framed the following questions which I refer in accordance with his wishes:—

(1) Whether an assessment already made under section 23 (4) can be re-opened by an Income-tax Officer under section 34 on the sole ground that there has been an under-assessment in respect of particular sources of income.

(2) Whether a notice under section 34 must specify the detailed grounds on which the assessment is proposed to be re-opened.

5. With regard to the first question, the petitioner's Vakil argues that section 34 does not empower an Income-tax Officer to revise his own assessment and that the section can only be applied when income under one of the six heads mentioned in section 6 has not been assessed in the original assessment, i.e., he argues that as the two demand notices issued in this case were under the heads 'Business' and 'Property', no income can be said to have escaped assessment. It appears to me that the provisions of section 34 cannot be so limited. It is surely absurd to contend that if a man has trade in grains and in hides—both assessable under the head 'Business'—and if, in the course of the original assessment, he manages to conceal the existence of the hide trade, an Income-tax Officer cannot under section 34 re-open the assessment and levy tax on the hide trade. The legislature cannot have intended to put this premium on dishonesty; nor can it have been intended that every such case should be dealt with by the Commissioner under section 33. The intention of section 34 is no doubt to give an Income-tax Officer the same powers as are possessed by Surveyors under section 125 of the English Act except that the power of review is limited to one year.

6. With regard to the second point, I can find nothing in the section to justify the view put forward by the petitioner. Section 34 empowers the Income-tax Officer to serve upon the assessee a notice calling for all or any of the particulars which can

* At the hearing of the reference, the Court in its judgment did not deal with this question. Ed.

be included in a notice under section 22 (2), i.e., the Income-tax Officer may send the assessee the usual form and require him to fill it up completely. But the Income-tax Officer need not adopt this course. He need not call for all the particulars. If he **chooses** to say he will be satisfied with some of the particulars usually called for, if, for instance, he simply asks, as he did in this case, for a true and correct statement of income earned during the year 1921-22, the procedure seems to me to be perfectly correct. The assessee will be given full details of the income which is alleged to have escaped assessment before the proceedings are completed. It is true that under section 126 of the English Act, in the case of surcharges, the Surveyor is definitely required to specify the particulars of the income which he believes to have been omitted from the original assessment but surcharges are of a penal nature, the corresponding section in the Indian Act being section 28 which admittedly does require the disclosure of full particulars to the assessee.

A. Krishnaswamy Iyer, for T. S. Krishnamurthy Iyer and N. Sivarama-krishna Iyer, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

We answer the first question in the affirmative and the second question in the negative.

It now appears that the point which the Assessee seeks to argue is one that has not been referred or sought to be referred.

Costs (Pleader's fee of Rs. 150) will be paid by the assessee.

[150] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

[19th January, 1926.]

Baij Nath Assessee.*

v.

The Commissioner of Income-tax, Punjab and North-West Frontier Province. ..

.. Referring Officer.

Income tax Act (XI of 1922), Sec. 23—Basis of assessment—Hearsay evidence, acting on—Rejection of accounts—Income-tax officer to act judicially.

An Income-tax officer should base his assessment on legal and not merely hearsay evidence and be governed in his procedure by judicial considerations.

Case [Case No. 549 of 1924] stated under section 66 (3) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Punjab and N. W. F. Province, for the opinion of the Court, in compliance with the order of the High Court dated 3rd November, 1924.

CASE.

By order dated the 3rd November, 1924, but communicated to me for the first time under cover of a letter No. 1480-J, dated the 19th February 1925, from the Deputy Registrar of the High Court, I am required by the High Court of Judicature at Lahore under section 66 (3) of the Income-tax Act (XI of 1922) to refer to the said Court "the legality of the procedure followed" by the Income-tax Department in assessing the petitioner Baij Nath, son of Chajju Mal, Gumti Bazaar, Lahore.

2. I must bring to their Lordships' notice certain facts that suggest to my mind a doubt whether the High Court has any jurisdiction to call on the Commissioner to make a reference in this case. Section 66, sub-section (3) provides that, if on any application being made under sub-section (2) of the same section, the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court, if it is not satisfied with the Commissioner's decision, may require him to state a case.

3. A valid application to the Commissioner under sub-section (2) is thus a condition precedent to an application under sub-section (3); we have next to see in what circumstances an application may be made to the Commissioner under sub-section (2). That sub-section opens with the words "Within one month of the passing of an order under section 31 or section 32 the assessee in respect of whom the order was passed may by application accompanied by a fee require the Commissioner to refer to the High Court any question". It is thus evident that, as the existence of a valid application under sub-section (2) is a condition precedent to the presentation of a valid application under sub-section (3), so the existence of a valid order under section 31 or 32 is a condition precedent to the presentation of a valid application under sub-section (2). Consequently the existence of a valid order under section 31 or 32 is a condition precedent to a valid application under sub-section (3) of section 66. That is to say, I would submit, that, unless a valid order under section 31 or section 32 has been passed in the present case, your Lordships have no jurisdiction to entertain the application under section 66 (3) or to pass orders on the reference made by the Commissioner to your Lordships in pursuance of the order of the Hon'ble Mr. Justice LeRossignol purporting to act under section 66, sub-section (3).

4. I would next invite your Lordships' attention to the proviso to section 30, sub-section (1). This runs as follows:—"Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23". Turning to sub-section (4) of section 23, we find that "If . . . any person fails to make a return under sub-section (2) of section 22, or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment." It will be observed that sub-sections (1) and (3) of section 23 cannot be applied legally where the assessee has either (a) made no valid return; or (b) having made a return, failed to comply with all the terms of a notice issued under section 23 (2). Where the assessee has made default in either of these matters, the only sub-section under which the Income-tax Officer can proceed to assessment is sub-section (4) of section 23.

5. The question therefore arises whether in the present case (a) the assessee has made a valid return; or (b) the assessee, having made a return, has complied with all the terms of a notice under section 23 (2). My findings on these two questions of facts are as follows:—

(a) The assessee submitted no return. That this is so appears from the fact that there is no such return on the file; that there is no reference in the assessment order dated the 20th December, 1922 to any return having been submitted; that in the applicant's petition dated the 10th March 1924 no claim is made that a return was submitted; and finally that, during the proceedings in the appellate court, the applicant on the 24th May, 1923 submitted a lengthy statement of his alleged income for the 12 months in question, i.e., ending the 31st March 1924. It appears, however, that on a previous occasion my predecessor, apparently by a misapprehension, treating the statement of the 24th May, 1923 as a return prior to assessment, acted on the assumption that a return had been submitted, and it will therefore be equitable to consider the case in the alternative also as one in which a return was duly submitted. In my predecessor's order dated the 31st March, 1924 appear the following words: "In this case the Income-tax Officer found himself unable to accept the return of income made by the petitioner under section 22 (2) as he had reason to believe that it was not correct. Similarly, on appeal, the Assistant Commissioner found himself unable to accept the return." A perusal of the assessment order, dated the 20th December 1922, and of the Assistant Commissioner's order, in appeal, dated the 11th February 1924, will show that there is no mention in either order of any return and my predecessor clearly had in mind the statement dated the 24th May 1923.

Assuming, however, for the sake of argument that a return was made, I now come to question (b). A notice was duly served on the assessee under section 23 (2) of the Income-tax Act calling upon him to produce his accounts on the 16th October, 1922.

The messenger entrusted with the serving of the notice reported that the assessee refused to sign the notice in token of service, and on the appointed day the assessee failed to appear and produce his accounts. It is clear, therefore, that he has failed to comply with all the terms of the notice issued under section 23 (2). It will be seen from the assessment order that the Income-tax Officer, finding that the assessee failed to produce his accounts, in spite of the notice under section 23 (2), proceeded to assess him to the best of his judgment under section 23 (4).

6. Whether therefore it be held that the assessee failed to make a return, or that, having made a return, he failed to comply with all the terms of the notice under section 23 (2), the assessment order was passed under section 23 (4), and therefore under the proviso to section 30 (1) the assessee had no right of appeal, and the Assistant Commissioner had no authority to pass any order on appeal under section 31. The order passed by the Assistant Commissioner on the 11th February 1924 does not specify under what section it purports to have been passed, but it is clear that it cannot be a valid order under section 31, since the Assistant Commissioner had no power to entertain an appeal and to dispose of it in circumstances in which the law explicitly says that there shall be no appeal. I submit, therefore, that no valid order exists under section 31 or section 32, and that consequently the conditions precedent to an application under section 66 (2) do not exist; nor can my predecessor's order purporting to be passed under section 66 (3) refusing to state a case possess any legal status whatever, and finally that the conditions precedent to an application to the High Court under section 66 (3) are entirely absent and that the High Court, therefore, as I venture to submit, has no jurisdiction in the matter. I would further submit that the fact that my predecessor over-looked the circumstances that the assessee had made no return, or, having made a return, had failed to comply with the terms of the notice issued under section 23 (2), and had no right of appeal, and that consequently he had no right to claim a reference to the High Court on any point of law, does not affect the situation because neither the Commissioner nor any one else has any power under the law to condone or ignore the defects that I have pointed out.

7. Should your Lordships hold, however, that the Court has jurisdiction, I proceed as required by law to draw up a statement of the case and to record my opinion thereon. I am required in general terms to refer to the High Court the legality of the procedure followed by the Income-tax Department in assessing the petitioner. I have shown at the conclusion of paragraph 5 above that the Income-tax Officer, finding that the assessee failed to comply with the terms of a notice issued under section 23 (3), was constrained under section 23 (4) of the Act, this being the only course open to him, to assess the petitioner to the best of his judgment. The Concise Oxford Dictionary defines "judgment" (in this sense) as "opinion, estimate". In such circumstances, therefore, the law requires the Income-tax Officer to assess on an estimate and in the present case the Income-tax Officer, in the words of his order, dated the 20th December, 1922, assessed "on an estimated income of Rs. 12,000".

8. I may be pardoned—I trust—for adding that there is nothing else that the Income-tax Officer can or could do when the assessee fails to make a return, or withholds evidence that he alone can furnish, and on which alone an accurate computation of his income could be based. It is the duty of the Income-tax Officer, imposed on him by the statute, to assess the income, that is, to determine the amount of the income in order to ascertain whether it is liable to tax and, if so the rate of tax applicable and the amount of tax due. It would be contrary to the ordinary principles of evidence to hold that, where the assessee has withheld evidence as to the amount of his income, the Income-tax Officer is bound to decide that he has no assessable income. It is obvious, moreover, that to admit any such principle would have the effect of encouraging assesseees to evade the tax and rendering it absurdly easy for them to do so. Whether the Income-tax Officer *has* "made the assessment to the best of his judgment", that is to say, whether the estimate that he has made is satisfactory and reasonable, having regard to the materials at his disposal, is, I submit, a

question of fact that the Commissioner, in the exercise of his powers of review under section 33, is the only authority legally competent to decide. The jurisdiction of the High Court does not extend to the decision of such questions of fact.

9. I would invite their Lordships' attention in passing to the fact that the law of England, like that of India, gives the fullest discretion to the assessing authorities to determine the income as they think fit where the assessee has failed to adduce satisfactory evidence. It will be sufficient perhaps to quote the words of the Lord President of the Court of Session in the case of *Macpherson and Company v. Moore* (1). "Messrs Macpherson and Company, . . . if they do not choose as they have not chosen, to state an account so that the amount of the profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown." I would invite attention to the very strong phrase "random assessment". Lord Mackenzie said in the same case, "With regard to the Solicitor-General's observations upon the practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say this: that it is not necessary to arrive at any satisfactory conclusion upon the matter because it is not a matter with which the courts are concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be, whether they can be done in a satisfactory manner or not."

10. After the Income-tax Officer had made his assessment the petitioner instituted an appeal in the Court of the Assistant Commissioner. As pointed out above, such an appeal was barred by the proviso to section 30 (1) of the Income-tax Act, and the Assistant Commissioner had no authority to entertain it. But the policy of the Income-tax Department is always to arrive at a true assessment and to give assessee as much latitude as possible, and it was open to the Assistant Commissioner to order further enquiries to be made and if any modification appeared necessary, to report the case to the Commissioner for action under section 33. As a result of the further enquiries made, the Assistant Commissioner on the 11th February, 1924 purported to pass an order reducing the assessment from one on Rs. 12,000 to one on Rs. 7,220. Such reduction was entirely *ultra vires*, but, as it was in favour of the assessee, the reduction itself has naturally not been called in question. It was during the enquiries made by order of the Assistant Commissioner that the petitioner furnished at that Officer's request the statement of income dated the 24th May, 1923, which is erroneously quoted by the petitioner as a return under section 22 (2). The Assistant Commissioner for reasons given in his order of the 11th February, 1924 did not accept the said statement as a correct statement of the assessee's income during the accounting period, and gave good reasons for holding the income to have been Rs. 7,220. Had the Assistant Commissioner, instead of purporting to pass an order himself reducing the income from Rs. 12,000 to Rs. 7,220, reported the case to Commissioner, with a recommendation to this effect, his proceedings would have been in order. As matters stand, his order is entirely *ultra vires* and void. This does not as a matter of fact affect the legality of the final assessment as this was legally determined at a later date by the order of the Commissioner referred to in the next paragraph.

11. The assessee then submitted a petition to the Commissioner under section 33 of the Act. My predecessor in the exercise of his powers under that section called for the proceedings, and, after causing certain further enquiries to be made, passed an order dated the 15th July, 1924, finally reducing the assessment to one on Rs. 4,500.

12. To recapitulate, I submit that the High Court has no jurisdiction to deal with the present reference; that, where the assessee deliberately withholds his accounts, an assessment based on such materials as are available to the Income-tax Officer is inevitable and entirely legal; that in such cases the law requires the assessing officers to frame an estimate, leaves certain matters to his opinion and leaves him full discretion as to the basis on which and manner in which the income should be determined; that, when the law provides no right of appeal, the Commissioner is the

only authority legally entitled to question the reasonableness of the Income-tax Officer's opinion or the wisdom of his exercise of this judgment ; that such matters are not within the jurisdiction of the High Court, whose functions do not include the assessment of income-tax, and that in the present case the Income-tax Department did make a proper use of such materials as were before it.

Lala Jagan Nath Agarwal, for the assessee.

Carden Noad, Government Advocate, for the Crown.

JUDGMENT.

This is a reference by the Commissioner of Income-tax made under section 66 of the Income-tax Act of 1922.

The assessee was originally assessed on an income of Rs. 12,000 which on appeal was reduced to Rs. 7,220 and on review by the Commissioner to Rs. 4,500.

We agree with the petitioner that the Income-tax Officer should be governed in his procedure by judicial considerations. He should base the assessment on legal and not mere hearsay evidence, which may be the evidence of his officers or of members of the public, but without evidence that items which do not appear in an account should find a place therein, he is not entitled to assume on mere general hearsay that those items should appear in the account.

Should he however find on good evidence that even one substantial item is missing, he would be entitled to treat the whole account as unreliable.

In this case we find it unnecessary to express our views more specifically, for we see that the final assessment was made on the admissions of the assessee and also that the Commissioner holds as a fact that the assessee refused a notice under section 23 (2) to appear and meet the criticisms levelled against his accounts.

Petitioners shall pay the costs of this hearing, Counsel's fees, Rs. 100.

[151] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

[20th January, 1926.]

The firm, Gokal Chand Jagan Nath

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab and North West Frontier Province

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 13 and 66 (3)—Jurisdiction to order reference—Objection not permissible after reference—Assessee's method of accounting—Rejection as basis of assessment.

Any objection to the jurisdiction of the court to issue an order under Sec. 66 (3) of the Income-tax Act calling upon the Commissioner to state a case should be taken at the making of the application thereunder and could not be taken later at the hearing of reference.

Thrikamji Jiwan Das v. Commissioner of Income-tax, 1 I. T. C. 406, Followed.

Under the proviso to Sec. 13, the Income-tax Officer is the sole arbiter on the question of the possibility of deducing the income, profits and gains of the assessee from the method of accounting employed by him.

Case [Case No. 594 of 1923] stated under section 66 (1) and (3) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Punjab and North West Frontier Province, for the opinion of the Court in compliance with the order of the High Court directing the Commissioner to state a case.

CASE.

My order of the 10th July gives the preliminary history of this case, which relates to the assessment for 1921-22, which was made on the 8th January 1922, when Act VII of 1918 was still in force. In that order I declined to accede to the petitioner's request for a reference to be made to the High Court under section 66 (2), on the ground that no point of law was involved. The petitioners then applied to the High Court for the issue of a mandamus under section 66 (3). This application the High Court has granted by its order dated the 22nd April, a copy of which was sent to

* A. I. R. (1926) Lah. 446 ; 94 Ind. Cas. 128.

me on the 26th May. In this order I am directed to state a case to the High Court on two points, but before doing this there are certain preliminary points upon which I would request the decision of the High Court.

2. These points arise out of the following facts. The assessment to which this reference relates was made on the 8th January 1922 under Act VII of 1918 (Act XI of 1922 did not come into force until the 1st April 1922), and as neither returns nor accounts were submitted, it was made under section 18 (4) of that Act. Similarly, the appeal which followed was admitted on the 6th March 1922 under section 21 of the same Act (see the Assistant Commissioner's order of that date), and, in this connection it is to be noted that, had Act XI of 1922 been in force then, in view of the proviso to section 30 (1) of that Act it could not have been admitted, as neither return nor accounts had been submitted on assessment. The proviso is perfectly explicit, and as opposed to the corresponding section 21 of Act VII of 1918, allows no discretion in the matter.

3. It would appear that in spite of these facts, the Assistant Commissioner's final appellate order of the 8th November 1922 is held by the High Court to have been made under section 30 (1) of Act XI of 1922, presumably on the ground that this Act was in force when it was passed. This is nowhere expressly stated, but it is perhaps a legitimate inference from the fact that: (a) a mandamus has been issued under section 66 (3) of Act XI of 1922, and (b) that the issue of a mandamus under this Act would only appear to be allowable in the circumstances specified in section 66 (2), that is to say, when a question of law arises out of an order passed under section 31 or section 32.

4. If I am right in thinking that the present mandamus has been issued on the assumption that the Assistant Commissioner's appellate order was passed under section 31 of the present Act and not under section 22 of Act VII of 1918, I venture to submit with all possible respect to the supreme authority of the High Court, that in that case the Assistant Commissioner's order is null and void owing to the proviso to section 30 (1), which gives an appellate court no discretion to admit an appeal in the circumstances under which the assessment in question was made. These circumstances were that neither return nor accounts had been submitted, in consequence of which the assessment had to be made under section 18 (4) of Act VII of 1918, corresponding with section 23 (4) of Act XI of 1922, the sub-section to which the proviso to section 30 (1) applies. If then the Assistant Commissioner's order is invalid, it is for consideration whether a mandamus can be based upon it, and I should be glad to have a ruling of the High Court on the subject.

5. But there is another point to be determined first, and that is whether the Assistant Commissioner's order of the 8th November, 1922 was passed under Act XI of 1922, which was in force at the time, or under Act VII of 1918, which was in force when the appeal was admitted. This point has so far not been expressly decided but, as stated above, it appears to have been tacitly assumed by the learned Judges of the High Court who have dealt with the case that the order was passed under Act XI of 1922. The order passed does not state under which Act or section it was passed, but from the fact that the appeal was admitted under Act VII of 1918 and that it could not have been admitted under Act XI of 1922, it may be inferred that it was intended to be passed under section 22 of the earlier Act. As, however, this is not expressly stated, the order must be presumed to have been passed under the Act which applied to the case. The question is which of the two Acts applied? In my opinion the answer is Act VII of 1918, as the appeal was admitted under that Act, and it could not have been admitted under Act XI of 1922.

The alternative view assumes that an appeal which has been admitted under one Act can be decided under another Act, under which it could not have been admitted, which appears to me anomalous. Moreover it may, I think, be held that all cases assessed under Act VII of 1918 are governed both on appeal and on review by that

Act, even if proceedings on appeal or review have to be determined after that Act has ceased to be in force. This at least appears to be the view taken in the ruling of the High Court in Punjab High Court Judgment No. 226 of 1923, dated 17th April 1923.

6. In view of what is said above I would ask for a ruling under section 66 (1) on the following preliminary points :—

(i) Whether an appeal which has been admitted under Act VII of 1918 can be decided under Act XI of 1922, having regard to the fact that it could not have been admitted under that Act;

(ii) If the answer is in the negative, whether the High Court had any power to issue the present mandamus under section 66 (3) of Act XI of 1922;

(iii) If, on the other hand, the answer to No. (i) is in the affirmative, whether, in view of the proviso to section 30 of Act XI of 1922 and of the fact that the petitioners on assessment submitted neither return nor accounts, the Assistant Commissioner's order of the 8th November 1922 is *ultra vires* and *ipso facto* void ; and

(iv) If so, whether the High Court had any power to issue the present mandamus, no valid order having been passed under either section 31 or 32 of Act XI of 1922.

Under section 66 (1) I am required to state my opinion upon each point referred. In view of what is said above, I submit with the utmost deference that the answer to the first two points should be in the negative, to the third if it arises, in the affirmative, and to the fourth in the negative.

7. I come now to the two points upon which I am directed to state a case to the High Court. The first point is as follows :—

“Whether, in view of the undertaking given by the Income-tax Officer in the course of the assessment for the year, 1920-21, the petitioners are entitled to receive credit in the assessment of 1921-22 for any loss which they are proved to have sustained in the sugar business in 1919-20.”

This question contains by implication a statement of fact, namely, that the Income-tax Officer gave a certain undertaking. It is my duty to determine any question of fact that may arise, and my decision on this particular point is that it is perfectly clear that the Income-tax Officer neither gave, nor had any authority to give, any such undertaking. The Officer referred to is presumably one of the Special Income-tax Officers appointed under Act VII of 1918. These Officers had not the same powers as an Income-tax Officer under the present Act, for they had only power to assess incomes not exceeding Rs. 10,000 ; the Special Income-tax Officer did not make the assessment but submitted a report dated the 24th February 1921 to the Deputy Commissioner, Sialkot, who, acting as Collector made the assessment. In that report the Special Income-tax Officer recommended that the alleged loss should be taken into account in the following year, but the recommendation was specifically rejected by the Deputy Commissioner,—*vide* his order, dated the 25th February 1921.

It is, therefore, perfectly clear that the Special Income-tax Officer could not have done more than inform the assessee that he would make the above recommendation ; and even if he had given the alleged ‘ undertaking ’ it would have been entirely *ultra vires*.

Further as a matter of strict law, even if the Assessing Officer, the Deputy Commissioner, had given any such undertaking (and it is obvious from his order that he could not have done so), that too would have been *ultra vires*, if it was an undertaking that the petitioner firm would be assessed in 1921-22 on the basis of any sum other than their income in the previous year (1920-21) which is the basis prescribed by law. An Assessing Officer has no power to enter into contract on behalf of Government with an assessee to assess him otherwise than on the income of the year previous to that in which the assessment is made, and in determining this income only the losses sustained in that year can be taken into account. If, on the other hand, the

undertaking was to assess the petitioner firm in accordance with the law, it was superfluous and an assessment on any other basis would be bad, not because it violated the undertaking but because it infringed the law.

As however no undertaking was given, it is difficult and presumably unnecessary to state a case upon the point in question which is based entirely upon that assumption that the undertaking was given.

8. I may perhaps be permitted to add that I am not sure whether the reference to section 35 in High Court's orders is a clerical error and, if so, what the correct section is. There does not seem to be any question in this case of rectifying any mistake apparent from the record with the power conferred by section 35.

9. The second point upon which I am directed to state a case is as follows :—

"Whether an assessee is entitled to challenge the correctness of the opinion of the Income-tax Officer that the method of accounting employed is such that the income, profits and gains cannot properly be deduced therefrom"

In this question it is not stated before whom, nor under what circumstances, the right of challenge is claimed. But presumably it refers to the right in the High Court under section 66 (2). If so, the answer is in my opinion in the negative, for the question whether a method of accounting is such that income, profits and gains can properly be deduced from it is one of accountancy and in no sense a question of law, and in complicated cases it is a question upon which only an expert in accountancy, such as our Income-tax Officers are intended to be, can possibly express an opinion of value. To allow this opinion to be challenged in High Court would make the latter potentially the final assessing authority in every case in which income, profits and gains cannot be clearly deduced from the accounts. And, as last year in the Punjab and N. W. F. Province profit and loss could only accurately be determined in 2,547 cases out of the 17,907 in which accounts were produced, the effect will be to give the High Court a scope and power certainly never contemplated by the framers of the Act. I, therefore, recommend that this question, which I trust I have understood correctly, should be answered in the negative.

Lala Mool Chand, for the assessee.

Carden Noad, Government Advocate, for the Crown.

JUDGMENT.

In accordance with a direction given by this Court under section 66 (3) of the Income-tax Act (XI of 1922) the Commissioner of Income-tax has referred two questions of law for decision. He has at the same time doubted the competency of this Court to issue the mandamus under section 66 (3) on the ground that the Act applicable to the case is the Act of 1918 and not that of 1922, but this is a point which should have been taken at the hearing of the application made under the said section and in agreement with the view taken in *Thrikamji Jiwan Das v. Commissioner of Income-tax* (1) we hold that the order passed on the application cannot now be questioned.

The first point referred to us is whether in view of the undertaking given by the Income-tax Officer in the course of the assessment for the year 1920-21 the petitioners are entitled to receive credit in the assessment of 1921-22 for any loss which they are proved to have sustained in the sugar business in 1919-20. The learned Commissioner urges that the Income-tax Officer did not in fact give an undertaking that any loss sustained by the petitioners in their business in 1919-20 would be taken into account in the assessment for 1921-22, but only recommended that this should be done. However this may be, we find that the Assistant Commissioner in his order of the 8th November 1922 in the appeal against the assessment found that the alleged loss had not been proved, inasmuch as it was impossible to check the profit and loss statements because weights were not stated therein. On that finding no credit can be given to the petitioners for any losses for the year 1919-20.

(1) 1 I. T. C. 406; 4 Pat. 224.

If then the terms 'capital' and 'stock-in-trade' are to be opposed, the essence of the one is that it is wealth accumulated for producing more wealth or set aside for the satisfaction of future needs, and the essence of the other, that it is goods kept on sale and constantly changing hands.

3. It has now to be considered to which category the Bank's securities belong. I may note firstly, that the depreciation claimed on the securities in question is not on account of securities sold during the accounting year but entirely on account of securities that were still in the Bank's possession at the close of the year. Secondly, I attach a copy of a statement which shows the extent to which the Bank has purchased and sold securities from 1895 to 1921 inclusive. I exclude subsequent years, as the assessment for 1922-23 is not concerned with them. From this statement it will be seen :—

(a) that in 23 years securities were purchased to the value of Rs. 83,63,425 and sold to the value of only Rs. 17,28,050; and

(b) that in 11 out of the 23 years no sales were made at all.

If we take the last five years, viz., 1917-21, we find that purchases amount to Rs. 36,61,125 and sales to only Rs. 23,750.

In the face of these figures it seems to me impossible to regard these securities as in any sense conforming to the definition of 'stock-in-trade' given above. On the other hand the securities satisfy the two conditions of the definition of 'capital'; for, firstly they produce more wealth in the shape of interest and, secondly they have undoubtedly been purchased partly as a reserve for 'future needs'. In other words they are clearly investments made by the Bank in the ordinary course of its banking business to strengthen its financial position and to increase its profits, and as such they differ fundamentally from the purchases of stocks and shares made by those who deal habitually in them. In my opinion, they undoubtedly form part of the Bank's capital and recommend that the point may be decided accordingly.

4. The second point is "whether the deduction claimed falls under section 10 (2) (ix) of the Income-tax Act."

Section 10 (2) states that the profits or gains of a business shall be computed after making certain allowances, one of which is stated in section 10 (2) (ix) to be "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains." If my view is accepted on the first point, it follows automatically that the answer to the second point must be in the negative, for, even if 'expenditure' is held to include a loss by depreciation, the loss claimed will be 'of the nature of capital expenditure' and not therefore admissible. If, on the other hand, my view is not accepted and it is held that the securities are part of the Bank's stock-in-trade, I am prepared to admit that the claim should be allowed, not, however, under section 10 (2) (ix), but under section 13.

5. The third and last point stated for reference is "whether the deduction claimed. . . is permissible, even if it does not fall under section 10."

In this connection a reference is invited to the income-tax case, *In Re, The Tata Industrial Bank, Limited* (1), in which it was decided by the Bombay High Court that a deduction of Rs. 2,98,000 representing depreciation on the Tata Industrial Bank's securities could not be allowed under section 19 of the Income-tax Act, VII of 1918. The case is on all fours with that under reference except on two points, viz.:—

(a) it was decided under Act VII of 1918, whereas the present case lies under Act XI of 1922, and

(b) the Tata Industrial Bank, Limited, was not prepared to agree to being taxed upon any subsequent appreciation of its securities, whereas the Punjab National Bank, I understand, is prepared to agree to this, if necessary.

(1) 1 I. T. C. 152; 46 Bom. 567.

(a) is a distinction without a difference, for, so far as this reference is concerned, section 9 (2) of Act VII of 1918 corresponds exactly in all material particulars with section 10 (2) of the present Act. (b) will be considered later.

6. The Bombay case was heard by the Chief Justice Sir Norman Macleod and Mr. Justice Shah. In his judgment the Chief Justice held (page 160) that "the Assessing Officer is not entitled to allow any deduction for sums paid or debited other than those properly paid and debited as detailed in sub-section (2)" (i.e. sub-section (2) of section 9). Mr. Justice Shah in his judgment agreed with the Chief Justice that the only allowances that an assessee can claim "as of right" are those specified in sub-section (2); but he qualifies this by adding "that where a deduction is proper and necessary to be made in order to ascertain the 'profits' or gross income of any business, the assessing authority may allow it in his discretion." The Collector, however, "is not bound to make any other allowances in favour of the party, nor is the party entitled thereto as of right." The only point, therefore, on which he would appear to differ from the Chief Justice is that he held that the assessing authorities have discretion to allow deductions that they consider 'proper and necessary'. That is to say, even if Mr. Justice Shah's view is accepted, the decision whether a deduction, which is not specified in section 10 of Act XI of 1922, can be allowed, must rest with the assessing authorities. In coming to the conclusion that the deduction claimed by the Tata Industrial Bank was not 'proper and necessary', Mr. Justice Shah appears to have been influenced by the fact that the Bank refused to agree to any subsequent appreciation of its securities being taxed. It is possible that, had the Bank agreed to this, he might have held the deduction to be a proper one, but, even so, according to the view expressed in his judgment, the decision as to whether the deduction should be made or not would rest with the assessing authorities. Accordingly, even if Mr. Justice Shah's view rather than the Chief Justice's is followed, the answer to the third point would be that the deduction is only permissible at the discretion of the assessing authorities. I would, however, respectfully submit that on this point the Chief Justice's view is to be preferred, for the extent to which depreciation of any kind can be allowed is specifically laid down in clause (vi) of sub-section (2) of section 10 of Act XI of 1922. Under this clause depreciation is restricted to buildings, machinery, plant or furniture, and there is no other clause in the Act under which it can be specifically claimed. Had it been the intention of the framers of the Act to allow depreciation on investments, it is fair to presume that this intention would have been clearly stated in clause (vi); and as the clause is silent on the subject, it can only be supposed that there was no such intention. I, therefore, recommend that the third and last question should be answered in the negative.

Bakshi Tek Chand, Advocate and *Lala Hargopal*, Vakil, for the assesseees.

Carden Noad, Government Advocate, for the Crown,

JUDGMENT.

This is a reference by the Income-tax Commissioner of the Punjab under section 66 of the Income-tax Act of 1922.

The assessee is the Punjab National Bank, Limited, a company incorporated under the Companies Act—which, of course, keeps its accounts on the mercantile accountancy system. In calculating its profits for the calendar year 1921 on which profits they were assessable to income-tax for the year 1922-23, the Company claimed a deduction of some three lacs in respect of their holding of high class Government securities which they asserted had suffered that degree of capital depreciation during the year. Their claim was disallowed on the ground that this was a capital depreciation and not an expenditure incurred solely for the purpose of earning profits.

After a careful consideration of the Act and the case law on the subject we are of opinion that the decision of the learned Commissioner that this sum is not deductible in calculating the assessable income of the Company is correct.

The scheme of the income-tax is that profits only shall be liable to income-tax and profits are no doubt commercial profits, the net income arrived at by deducting

gross expenditure from gross profits. At the same time it is not every kind of expenditure which is deductible. Admittedly no capital expenditure is deductible. But in this connection it is very necessary to retain the difference between fixed capital and floating capital which latter may also be conveniently called stock-in-trade. It is conceded on behalf of the Crown that income-tax profits cannot be correctly calculated unless depreciation in stock-in-trade is allowed, at any rate in all cases where the system of accounting is not on a cash basis. Section 10 of the Act in sub-section (2), clauses (1) to (viii) provides for certain specific allowances. Clause (ix) of the sub-section is an omnibus provision which permits the deduction of "any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains," and the question for decision is whether the depreciation in question can be allowed under this sub-clause.

For the petitioner it is contended that the money employed by the Company in purchasing these high class securities is money lent to Government and cannot be distinguished from the money employed by the Bank and lent by it to its other customers. For the Crown it is replied that the depreciation claimed is not an expenditure, that the purchase of the securities in question was made long before the year 1921 and that the expenditure was not made solely for the purpose of earning profits and gains.

Now, it cannot be denied that the Bank purchased these securities not for the purpose of trading in them but for the purpose of retaining them permanently for use in an emergency. It is the practice of all properly managed banks to invest a portion of their capital in high class securities in order to have a readily available supply of cash in a crisis. It would not pay a bank to employ all or the bulk of its capital in such an investment. Those securities were not held by the bank as floating capital; they were not held by the bank with the object of being dealt in day by day in the ordinary course of business. They were held as an emergency reserve and were regarded as the equivalent of ready cash with this considerable advantage over ready cash that they brought in a small but secured amount of interest. The ordinary daily business of the bank, the business in which it employs its floating capital, is the purchase and sale of commercial bills and the advance of loans to its customers. That the Bank itself did not consider these securities a part of its floating capital but rather regarded them as a permanent investment is clear from its own balance sheet where it exhibits these securities under the special head "investments". If instead of placing this capital in these securities it had been possible for the bank to sink this money in some other form the case would have been clearer. Let us suppose that it would be just as easy and sure to raise money on oil paintings as on these securities and the bank by way of holding an immediately available reserve had purchased oil paintings by Rembrandt or Reynolds and had subsequently discovered that one of its most expensive pictures was a forgery and was worth not 1/10th of the price paid for it, that no doubt would cause a loss of capital but it would be a loss of fixed capital, not of that portion of the capital which was used as working capital.

Another definition of "fixed capital" is capital which has been expended not merely for the production of profits in any given year but for the production of profits over an indefinite number of years. Judged by this test also the investment in those securities represents fixed and not fluctuating or working capital.

Again the alleged depreciation can hardly be called an expenditure. It is only a potential or temporary loss which though it may affect the policy of the directors in declaring a dividend for the year, may in the succeeding year be converted into an appreciation. There has been no actual expenditure in respect of that depreciation in the year 1921.

To take another illustration. If the banking company has sunk considerable capital in the construction of a head office and that building is burnt down and the company has neglected to insure that building, that depreciation in the company's assets would admittedly not be deductible from the profits accruing to the company.

For the foregoing reasons we hold that the securities with which this claim is concerned are permanent investments retained by the Bank as capitalists in its own

possession. They represent a non-recurrent expenditure of an extraordinary nature not made to earn profit in any particular year but to ensure for the future benefit of the business for several years to come.

Our answer, therefore, to the reference is that the securities in question are not a part of the stock-in-trade of the Bank but part of its fixed capital and, therefore, the deduction claimed does not fall under section 10 of the Income-tax Act. Finally, if the deduction is not justifiable under section 10 we are unable to find that it is admissible under any other provision of the Act.

The petitioner must pay the costs of the Crown. Counsel fees, Rs. 500.

[188] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol and Mr. Justice Martineau.

[20th January, 1926.]

Messrs. Dhuni Chand-Dhani Ram

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Province

.. Referring Officer.

Income-tax Act (XI of 1922), Sects. 13, 22 (4) and 23—Accounts produced by assessee—Assessment on estimate—Non-issue of notice under Section 23 (2)—Legality and proper procedure.

Where the assessee submitted a return and produced his accounts in compliance with the notice issued under section 22 (4) of the Income-tax Act, an assessment by the Income-tax Officer based on an estimate without giving notice to the assessee under section 23 (2) to appear and justify his return, is illegal.

In making an assessment the Income-tax Officer should proceed on judicial principles and the evidence produced by the assessee should be accepted unless rebutted by other admissible evidence and not by mere hearsay.

An wholly arbitrary assessment on an estimate made by the Income-tax Officer without disclosing any basis therefor or how it was arrived at, cannot be justified under section 13 of the Act.

Case [Case No. 509 of 1924] stated under section 66 (3) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Punjab and N. W. F. Province, for the opinion of the Court, in compliance with the order of the High Court dated the 24th October, 1924.

CASE.

By the order of the Hon'ble Mr. Justice LeRossignol, dated the 24th October 1924, in Civil Miscellaneous Case No. 509 of 1924, I am directed under section 66 (3) of the Indian Income-tax Act, XI of 1922, to refer to the High Court in connection with the assessment to income-tax of Messrs. Duni Chand-Dhani Ram, iron merchants of Lahore, for the year 1922-23 by the order, dated the 23rd February 1923, of the Additional Income-tax Officer, Lahore, the question: "Whether the assessment of Rs. 10,000 in respect of income from interest based on a mere estimate is legal."

2. I must first bring to their Lordships' notice certain facts that suggest to my mind a doubt whether the High Court has any jurisdiction to call on the Commissioner to make a reference in this case. Section 66, sub-section (3) provides that if on any application being made under sub-section (2) of the same section, the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court, and the High Court, if it is not satisfied with the Commissioner's decision, may require him to state a case.

3. A valid application to the Commissioner under sub-section (2) is thus a condition precedent to an application under sub-section (3). We have next to see in what circumstances an application may be made to the Commissioner under sub-section (2). That sub-section opens with the words "Within one month of the passing of an order under section 31 or section 32 the assessee in respect of whom the order was passed may by application accompanied by a fee require the Commissioner to refer to the High Court any question." It is thus evident that as the existence of a valid appli-

* (1926) I. L. R. 7 Lah. 201 ; 8 L. L. J. 106 ; A. I. R. (1926) Lah. 161 ; 94 Ind. Cas. 614.

cation under sub-section (2) is a condition precedent to the presentation of a valid application under sub-section (3), so the existence of a valid order under section 31 or 32 is a condition precedent to the presentation of a valid application under sub-section (2). Consequently the existence of a valid order under section 31 or 32 is a condition precedent to a valid application under sub-section (3) of section 66. That is to say—I would submit, that unless a valid order under section 31 or section 32 has been passed in the present case your Lordships have no jurisdiction to entertain the application under section 66 (3) or to pass orders on the reference made by the Commissioner to your Lordships in pursuance of the order of the Hon'ble Mr. Justice LeRossignol purporting to act under section 66, sub-section (3).

4. I would next invite your Lordships' attention to the proviso to section 30, sub-section (1). This runs as follows :—"Provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23." Turning to sub-section (4) of section 23 we find that "If . . . any person fails to make a return under . . . sub-section (2) of section 22 . . . the Income-tax Officer shall make the assessment to the best of his judgment." It will be observed that sub-sections (1), (2) and (3) of section 23 cannot be applied legally where the assessee has made no valid return. Sub-section (1) provides for the case where the return has been made and the Income-tax Officer is satisfied that it is correct and complete; sub-section (2) provides for the case where the return has been made and the Income-tax Officer is not so satisfied. In that case the Income-tax Officer must issue a notice calling on the assessee to produce any evidence on which he may rely in support of his return. Sub-section (3) provides how the Income-tax Officer shall proceed after he has issued a notice under sub-section (2).

5. The question therefore arises whether in the present case the assessee has made a valid return, and my finding on this question of fact is that he has not. He sent a blank form of return to the Income-tax Officer to which he attached a brief note on a separate sheet of paper setting forth his *estimated* profits from business and certain items of expenditure, and showing a nett loss of Rs. 1,916-12-0. This note or memorandum was not verified as required by section 22, sub-section (2) of the Act. This is itself a material defect since it is a failure to comply with a categorical requirement of the law. Apart from this, the details of the assessee's alleged income given in this note do not include all the 'prescribed particulars' referred to in section 22, sub-section (2). These particulars are specified in the form itself, which is embodied in a statutory rule 19 framed under section 59 of the Act by the Board of Inland Revenue (now the Central Board of Revenue).

6. The form of return in rule 19 requires that if the assessee keeps accounts on the mercantile system he shall furnish details in the form given in Note 5 to the Form of Return, and that if he does not keep accounts according to the mercantile system, he shall file a statement showing how he arrives at his taxable profits. The assessee did neither, and it is thus evident, I submit, that he has not complied with the provisions of section 22 (2); that consequently as the assessment could only be made legally under section 23 (4) (the fact that the Income-tax Officer did not specify this section in the assessment order is, I submit, immaterial. If he did not act under that sub-section there was no other provision of law under which he could act); that consequently the assessee under the proviso to section 30 (1) had no right of appeal; that therefore the order purporting to be passed under section 31 in this case by the Assistant Commissioner is null and void, since the Assistant Commissioner has no power to entertain an appeal and dispose of it in circumstances in which the law explicitly says that there shall be no appeal; that consequently the conditions precedent to an application under section 66 (2) do not exist, nor can my predecessor's order purporting to be passed under section 66 (3) refusing to state a case possess any legal status whatever, and finally, that the conditions precedent to an application to the High Court under section 66 (3) are entirely absent, and that the High Court, therefore, as I venture to submit, has no jurisdiction in the matter. I would further submit that the fact that my predecessors overlooked the circumstance, that the assessee had made no return, and had no right of appeal, and that consequently

he had no right to claim a reference to the High Court on any point of law, does not affect the situation, because neither the Commissioner nor any one else has any power under the law to condone or ignore the defects that I have pointed out.

7. Should your Lordships hold, however, that the Court has jurisdiction, I proceed to indicate as required by law what is the correct answer in my opinion to the question propounded by the Hon'ble Mr. Justice LeRossignol. I venture to presume that no particular significance is to be attached to the epithet 'mere' prefixed to the word 'estimate' in that question. Further I confine my attention here to the provisions of section 23, sub-section (4), since that is the sub-section under which the assessment in this case must have been made. Section 23, sub-section (4) says that where no return of income has been made and in certain other circumstances the Income-tax Officer "shall make the assessment to the best of his judgment." The Concise Oxford Dictionary defines 'judgment' (in this sense) as "opinion, estimate." It thus appears that the correct meaning of the expression 'make the assessment to the best of his judgment' is, that he is to make the best estimate that he can. Unless, therefore, some special significance attaches to the epithet 'mere' prefixed by the learned Judge to the word 'estimate', the answer to the question "whether an Income-tax Officer acting under section 23 (4) can legally base an assessment on estimate", is that that is precisely what the law in explicit terms requires him to do.

8. I may be pardoned, I trust, for adding there is nothing else that the Income-tax Officer can or could do when the assessee fails to make a return, or withholds evidence that he alone can furnish, and on which alone an accurate computation of his income could be based. It is the duty of the Income-tax Officer, imposed on him by the statute, to assess the income, that is, to determine the amount of the income in order to ascertain whether it is liable to tax, and if so the rate of tax applicable and the amount of tax due. It would be contrary to the ordinary principles of evidence to hold that where the assessee has withheld evidence as to the amount of his income the Income-tax Officer is bound to decide that he has no assessable income. It is obvious, moreover, that to admit any such principle would have the effect of encouraging assesseees to evade the tax and rendering it absurdly easy for them to do so. Whether the Income-tax Officer *has* "made the assessment to the best of his judgment," that is to say, whether the estimate that he has made is satisfactory and reasonable, having regard to the materials at his disposal, is I submit a question of fact that the Commissioner, in the exercise of his powers of review under section 33, is the only authority legally competent to decide. The jurisdiction of the High Court does not extend to the decision of such questions of fact.

9. I should perhaps point out that the fact that the Income-tax Officer called for the assessee's accounts is not to be interpreted to mean that he was acting under section 23, sub-section (2) and that therefore the assessment was made under section 23, sub-section (3). Even had the Income-tax Officer purported to act under those sub-sections his action, as I have endeavoured to show, would have been without legal warrant. But under section 22 (4) the Income-tax Officer may call for accounts and other documents from any person on whom a notice under section 22, sub-section (2) has been served, whether such person has complied with the terms of that notice or not. He has also the powers of a Civil Court to summon witnesses or documents under section 37, but this he is not bound to exercise.

10. Further, in order to leave no possible aspect of the case out of consideration, I venture to submit that had the assessment been one made under section 23, sub-section (3) the position would have been as follows. The Hon'ble Mr. Justice LeRossignol, presumably regarding the assessment as one made under that sub-section, observes: "The accounts, such as they are, must be the basis of assessment subject to any modification which must be established by reasonably precise evidence." Now section 13 sets forth the law in regard to the use to be made of the assessee's accounts in computing his income. The proviso to that section runs "Provided that if no method of accounting has been regularly employed, or if the method employed is such that in the opinion of the Income-tax Officer the income,

profits and gains cannot properly be deduced therefrom, then the computation shall be made on such basis and in such manner as the Income-tax Officer may determine." That is to say, that here too the law confers the widest discretion upon the Income-tax Officer to determine whether the assessment shall be based on the accounts or not. The law does *not* say that the assessment *must be based on the accounts* even if the Income-tax Officer is not satisfied with the accounts. It says that in such circumstances the assessment shall be made on such basis and in such manner as he may determine. Whether the accounts are satisfactory is a question of fact, and a question that is explicitly left to be determined by the *opinion* of the Income-tax Officer. The principles of accountancy are not prescribed by any law. They do not, I submit, raise questions of law at all. It was not, I submit, the intention of the legislature to leave to the High Court the determination of such questions, and thus in effect to constitute the High Court an assessing authority. I submit that the entire discretion vested in the Income-tax Officer could hardly have been expressed in more emphatic language than by the use of the phrases 'in the opinion of the Income-tax Officer' and 'upon such basis and in such manner as he may determine.'

11. It is moreover obvious that whereas in the present case a source of income is omitted from the accounts altogether, the accounts cannot be 'the basis of assessment' so far at all events as income from the omitted source is concerned.

I would invite your Lordships' attention in passing to the fact that the law of England, like that of India, gives the fullest discretion to the assessing authorities to determine the income as they think fit, where the assessee has failed to adduce satisfactory evidence. It will be sufficient perhaps to quote the words of the Lord President of the Court of Session in the case of *Macpherson and Co. v. Moore* (1). "Messrs. Macpherson and Co.....if they do not choose, as they have not chosen, to state an account so that the amount of the profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown." I would invite attention to the very strong phrase 'random assessment.' Lord Mackenzie said in the same case, "With regard to the Solicitor-General's observations upon the practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say this that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not a matter with which the Courts are concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be, whether they can be done in a satisfactory manner or not."

12. Finally, in order to assist their Lordships to a complete understanding of the case, I beg to add a few words in regard to the nature of the estimate framed by the Income-tax Officer. It might have been necessary for him, in order to discharge his statutory duty of assessing the assessee's income, to base his assessment on 'pure conjecture' (to borrow a phrase from the Honourable Mr. Justice LeRossignol). Had there been no better materials than pure conjecture on which to base it, then I submit it would have been his duty so to base it. Whether he actually did so, I submit, is a question of fact, and one therefore that is within my competence to determine. My finding is that the estimate that he was legally bound to frame and did frame was not based on pure conjecture. I find that as required by law, he "made the assessment to the best of his judgment," that is, that his estimate was based on the best materials to hand.

13. The Income-tax Officer had before him the records of the assessment of the firm in previous years. Such records are of course evidence of the utmost value enabling the assessing authority to check the probability of the state of affairs disclosed by the assessee's evidence, to supplement that evidence where it is defective, and where such evidence fails altogether, to frame an estimate as required by the law. The records in this case showed that in the proceedings for the year 1919-20 the assessee produced accounts showing an income from interest of over Rs.9,000, that in the two following years he neither made a return nor produced any accounts and acquiesced

in assessments that included an estimated income of Rs. 8,000 and Rs. 10,000 from interest and that in the year in which the assessment proceedings now under consideration were being conducted, the assessee in spite of declaring that the firm as such had not derived any income from interest did not disclose the fact that the firm had, at the close of the accounting period on which the proceedings were being based, split up into two branches each admittedly earning interest. On these facts the Income-tax Officer, quite reasonably in my opinion, thought himself justified in assuming that the income from interest was not less than the sum of Rs. 10,000 on which the assessee had previously submitted to assessment. The whole history of the case illustrates, if I may say so, the extreme leniency with which the Income-tax Department in this country, deals with persons who do not discharge their statutory obligation to disclose their true income. That the Income-tax Officer was at all events right in assuming that the assessee had some income from interest is rendered the more probable by the fact that in the following year the component parts of the previously joint firm each declared income from interest.

14. To recapitulate, I submit that the High Court has no jurisdiction to deal with the present reference, that where the assessee's accounts are incomplete or unsatisfactory an assessment on a 'mere estimate' or 'pure conjecture' may be inevitable and is entirely legal; that in such cases the law requires the assessing officer to frame an estimate, leaves certain matters of fact to be determined according to his 'opinion' and leaves him full discretion as to the basis on and manner in which the income should be determined, that the Assistant Commissioner, where there is an appeal, and the Commissioner are the only authorities legally entitled to question the reasonableness of the Income-tax Officer's 'opinion' or the wisdom of his exercise of his 'judgment'; that such matters are not within the jurisdiction of the High Court whose functions do not include the assessment of income-tax; and that in the present case, the Income-tax Officer did make a proper use of such materials as were before him.

Lala Jagan Nath Agarwal, for the assessee.

Carden Noad, Government Advocate, for the Crown.

JUDGMENT.

This is a case stated and referred by the Commissioner of Income-tax, Punjab, under clause (3) of section 66 of the Income-tax Act of 1922. The learned Commissioner prefaces his reference with a suggestion that this Court has no jurisdiction to issue a mandamus in this case on the ground that the Commissioner's own order in review of the appellate order passed by his Assistant was, equally with the appellate order of his Assistant, incompetent. The learned Government Advocate states that he is unable to support this contention which obviously has no force. The Commissioner's order still subsists and has not been set aside and it would be opposed to all ideas of congruity, legal or other, to hold that an order can be challenged on the ground that it should never have been issued.

The disputed assessment, which is confined to an item of Rs. 10,000 in respect of interest, was in respect of the year 1922-23. The return authorised by section 22 of the Act was made on the 9th September 1922, and that showed an income from interest of only Rs. 866. On the 12th February 1923, in obedience to an order issued under section 22, clause (4) the assessee produced his accounts before the Assessing Officer, and on the 23rd February received an assessment order to pay tax on an income of Rs. 30,000. The assessee applied for cancellation of the assessment under section 27, but the Income-tax Officer rejected it on the 18th April 1923 by the following order:—"Section 27 does not apply to this case; return was submitted, accounts were seen. The pleas raised are relating to appeal." The assessee then appealed to the Assistant Commissioner who entertained the appeal and remanded the case for fresh enquiry. The appeal was subsequently dismissed and an application made to the Commissioner for review met with the same fate, but on the merits.

Now, the main contention on behalf of the assessee is that he made a return which was recognised as a return. He produced all the books he had and if the Income-

tax Officer was not prepared to accept his accounts he should have acted in a judicial manner, and before proceeding to assess by a rule of thumb should have issued notice under section 23 (2) to the assessee to appear and answer the criticisms directed against his return and accounts.

The procedure under the Income-tax Act is as follows :—

A return of income is called for from the assessee and must be furnished. If that return is not furnished the assessee places himself at the mercy of the Income-tax Officer who shall then make the assessment to the best of his judgment, and the assessee will have no right of appeal.

If a return is made it is open to the Assessing Officer to accept it and to base the assessment entirely upon it. If he is not prepared to accept it forthwith, he may issue notice to the assessee to appear before him and justify his return by his accounts. If the assessee, although he has furnished the return, fails to produce his accounts in support of that return he is placed in the same position as if he had made no return at all. If, however, he has made a return and has produced his accounts in obedience to an order under section 22 (4), the Income-tax Officer is not justified in rejecting the return and the accounts and in assessing on a rule of thumb until he has given notice to the assessee under section 23 (2) of the Act to appear before him and justify his return.

In this case no such notice was issued to the assessee. The Income-tax Officer rejected his accounts which had been produced in compliance with a notice under sections 22 (4) and proceeded forthwith to make the assessment to the best of his judgment. In this connection we should like to draw the attention of the learned Commissioner to the great laxity which prevails in the offices in the matter of the issue of notices. Probably with the object of avoiding the multiplicity of notice forms, a form is issued which may be a notice either under section 22 (4) or under section 23 (2). If the notice is under section 22 (4) certain erasures are necessary before the notice issues. If the notice is one under section 23 (2) other portions of the notice must be erased. We find, however, that notices issue without erasures so that it is not possible for the assessee to know whether he is being summoned under section 22 (4) or section 23 (2). Section 37 of the Act indicates that the procedure of Income-tax Officers is of judicial nature, and in making his assessment the Income-tax Officer should proceed on judicial principles. If evidence is produced by the assessee in support of his return it should be accepted unless it is rebutted by other admissible evidence and not by mere hearsay.

Next, section 13 is invoked as justifying assessment by the Income-tax Officer. That section provides that if no method of accounting had been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer, the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. Now, the Income-tax Officer's application of this section was as follows :—"As regards income from interest the Inspector's estimate seems to me a little high. My own estimate is about Rs 10,000." We do not regard this wholly arbitrary assessment as one justified by section 13; for the Income-tax Officer does not lay down any basis, nor does he indicate how he arrives at his estimate of Rs 10,000. Had he found that the sums loaned were a certain figure, and had he calculated a flat rate upon those sums, we should have regarded his action as in conformity with the provisions of the section. But a bare statement that his estimate is so and so, we regard as a mere guess without any obvious basis. Had the Income-tax Officer even said "The income from interest last year was Rs. 10,000 and the assessee has shown me no reason for holding that his income from interest has diminished this year",—even that would have shown some appreciation of the limitations placed upon him by section 13.

When a return is furnished and accounts are put in support of that return, the accounts should be taken as the basis for assessment. They should not be rejected because they are complicated. Strictly regular accounts are not always available,

particularly in the case of petty traders who very often have only a poor knowledge of accounts.

We accept the view that the production by the petitioner of his accounts was a substantial compliance with the notice received under section 22 (4) and we hold the assessment illegal inasmuch as he received no opportunity under section 23 (2) to appear and meet the objections to the return and accounts produced by him. The petitioner shall receive costs of this reference from the respondent. Counsel's fees, Rs. 100.

[154] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice and Mr. Justice Beasley.

[17th August, 1925.]

The Commissioner of Income-tax, Madras Referring Officer.

v.

(1) Muthu K. A. R. M. Ramanathan Chetty

(2) Karuppan Chetty Assessee.

Income-tax Act (XI of 1922), Sec. 24 (1)—Unregistered firm of two partners—Second firm carried on by the two partners with another—First firm not a partner in the second firm—Set off of profits in one against losses in the other.

The assessee, an unregistered firm consisting of two partners, on being assessed to income-tax claimed to set off against the profits of the firm the share of the loss sustained by the two partners in another firm in which they were partners along with a third person. The Commissioner of Income-tax found that the assessee firm as such was not a partner or had any interest in the second firm and that there was no ledger for the assessee firm in the account books of the second firm which contained ledgers for the three individual partners in which the profits of the firm were credited.

Held, that on the facts found by the Commissioner, no question of any set off could arise.

Case [Referred Case No. 7 of 1925] stated under Sec. 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

Under Sec. 66 (2) of the Indian Income-tax Act, 1922, I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following question of law:—

"Whether an unregistered firm can set off against its income a loss suffered by another firm in which the two members of the former firm are also partners."

2. The question involves the interpretation of section 24 (1) and is therefore a point of law. It is therefore necessary for me to refer it though I consider the petitioner's contention to be frivolous.

3. The facts of the case are:—Muthu K. A. R. M. Ramanathan Chetty and Karuppan Chetty are partners in an unregistered firm of money-lenders carrying on business at Tiruvannamalai, North Arcot District. The firm was started on 12—10—20. The partners' shares are Muthu Ramanathan Chetty 13/16 and Karuppan Chetty 3/16. Karuppan Chetty is a genuine partner who has subscribed capital and is not a mere agent or employee. Muthu Ramanathan Chetty and Karuppan Chetty are also partners with one Vellayyan Chetty in another firm which was started on 26—1—1918 and was closed down on 19—4—1924. In this second firm Vellayyan Chetty was also a genuine partner who had subscribed capital. The sharers in the second firm were Rama-

nathan Chetty 11|16, Karuppan Chetty 3|16 and Vellayyan Chetty 2|16. The first firm made a profit of Rs. 19,639 in the account year 1923-24, while the second firm in the same year showed a loss of Rs. 7,147. The petitioner contends that the first firm is entitled to set off against its profits its partners' share of loss in the second firm. He relies on the High Court rulings in *Commissioner of Income-tax, Madras v. M. Ar. Ar. Arunachalam Chettiar* (1) and *Board of Revenue v. Munisami Chetty and Sons* (2).

4. In his application for a reference to the High Court the petitioner has stated that the firm of Ramanathan Chetty and Karuppan Chetty is a partner in the second firm of Ramanathan Chetty, Karuppan Chetty and Vellayyan Chetty. It is important that I should record a finding on this point. My finding is that the present petitioner, i.e., the firm of Ramanathan Chetty and Karuppan Chetty is not a partner in the second firm of Ramanathan Chetty, Karuppan Chetty and Vellayyan Chetty. My chief reasons for this finding are:—

(a) There is no ledger for the first firm in the account books of the second firm. The books of the firm of Ramanathan Chetty, Karuppan Chetty and Vellayyan Chetty contain ledgers for the three individual partners. In the profit ledger the total profits of Rs. 30,922-2-6 are mentioned as distributed among the three partners: Rs. 21,258-15-9 to Ramanathan Chetty, Rs. 3,865-4-4 to Vellayyan Chetty and Rs. 5,797-14-5 to Karuppan Chetty. The last two items are entered to the credit of the two individuals in their personal ledgers. The sum of Rs. 21,258-15-9, the distributed share of profits of Ramanathan Chetty has, under his instructions, been credited partly to his own ledger to the extent of Rs. 18,290-3-0 and the balance in the name of his daughter Valliammi Achi in her current account. This clearly shows that the firm composed of Ramanathan Chetty and Karuppan Chetty as such has no interest whatever in the partnership consisting of Ramanathan Chetty, Karuppan Chetty and Vellayyan Chetty.

(b) The history of the constitution of the firms shows that the firm of the two partners, Ramanathan Chetty and Karuppan Chetty cannot be a partner in the other firm. The latter firm was first formed on 26—1—1918 and then had four partners, Ramanathan Chetty—10 annas share, Lakshmanan Chetty—1 anna share, Vellayyan Chetty—2 annas, and Karuppan Chetty—3 annas. No. 2 sold his share to one Palaniappa Chettiar who in turn made it over to No. 1 on 14—7—21. The firm of Ramanathan Chetty and Karuppan Chetty was started in 12—10—1920, i.e., it was created later than the three partnered firm and cannot possibly be a partner in the old firm.

5. In the light of my finding recorded above (which is conclusive), I am of opinion that the petitioner's claim is not admissible. Under section 24 (1) an assessee can claim to set off his loss in one concern against his profits in another concern, but there is nothing in that section nor in any principle of law or common sense nor in the two decided cases mentioned by the petitioner to justify the claim made by the present assessee, viz., that the firm of Ramanathan Chetty and Karuppan Chetty should be allowed to set off against its profits the loss suffered by an entirely different assessee. In *Commissioner of Income-tax v. M. Ar. Ar. Arunachalam Chettiar* (1), it has been ruled that an individual carrying on business is entitled to set off against his personal profit his share of the loss suffered in business by an unregistered firm in which he was a partner. In accordance with that decision *Ramanathan Chetty and*

Karuppan Chetty will be allowed in the course of their individual assessments, which at the time of writing have not been completed, to deduct their share of the loss suffered by the firm of Ramanathan Chetty, Karuppan Chetty and Vellayyan Chetty from their other profits; but there is, in my opinion, no justification whatever for allowing the loss during the assessment of the firm of Ramanathan Chetty and Karuppan Chetty, that firm as such having no connection whatever with the firm of Ramanathan Chetty, Karuppan Chetty and Vellayyan Chetty.

V. Rajagopala Aiyar, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

COUTTS TROTTER, C. J. :—On the finding of fact contained in the Commissioner's letter No. 2382/24 dated 16th February 1925 there is nothing whatever to argue in this case, as the Commissioner himself says in paragraph 5, "In the light of my finding recorded above (which is conclusive) I am of opinion that the petitioner's claim is not admissible." It is not only not admissible but also not conceivable. We must therefore answer the reference by saying that, in our opinion, the point referred to us on the facts found by the Commissioner does not arise at all. Costs against the assessee, Rs. 250 the usual sum.

BEASLEY, J. :—I agree.

[155] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[28th September, 1925.]

Pitta Ramaswamiah	...	...	...	<i>Assessee*</i>
<i>v.</i>				

The Commissioner of Income-tax, Madras.

Income-tax Act, (XI of 1922), Secs. 23 (3), (4) & 30—Return of income by assessee—Notice to produce accounts to substantiate return—Non-production of accounts by assessee—Assessment, if under Sec. 23 (3) or 23 (4)—Appeal.

Where an assessee called upon by the Income-tax Officer to produce his accounts to substantiate his return of income did not do so and said that the Officer could assess him on the materials he could find.

Held, that the assessment fell within the terms of Sec. 23 (3) and not within Sec. 23 (4) and consequently an appeal lay against the assessment under Sec. 30 of the Income-tax Act.

Application under Sec. 45 of the Specific Relief Act (I of 1877) and Sec. 66 of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Madras, to state a case for the decision of the High Court.

K. Sankara Sastri, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The assessee in this case put in a statement of his income amounting to Rs. 420. At a later stage when he was called upon to produce his accounts and so forth to substantiate that statement, he did not do so and said that the Officer could assess him on the materials he could find. Thereupon the Officer proceeded to estimate the income which turned out in his judgment to be much

* (1926) I L R 49 Mad. 831; 24 L W 771; A I R (1927) Mad. 49; 98 Ind. Cas. 1067.

larger than what the assessee stated and it being in his opinion a gross case of misstatement of income, assessed him and from that assessment the assessee appealed. In appeal he did not succeed in persuading the Court that he had been wrongly assessed but he did persuade the appellate authority that it was a very gross case of misstatement of his income. Thereupon he was fined Rs. 250 under section 28 of the Act. Now he appeals against that and the chief ground he takes is that the proceedings before the appellate income-tax authority were *coram non judice*, because he says he acted under section 23(4) and not under section 23 (3); and that under section 30 (1) (the proviso to that sub-section), there was no appeal available to him in this case, for the proviso says that no appeal shall lie in respect of an assessment made under section 23 (4). The answer to that is that this man having put in an estimate of his income obviously fell within section 23 (3) and not section 23 (4) and that the Income-tax Officer's use of the words "to the best of his judgment", which he should not have used, has led to the contention that it was a case falling within sub-section (4) though it is not. There is no question to discuss here and this petition must be dismissed with costs, Rs. 150.

[156] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Martineau.

[23rd December, 1925.]

Achhru Ram and others

v.

The Crown

*Petitioners.**

Respondent.

Income-tax Act (XI of 1922), Sec. 22 (4)—Assessee called upon to produce accounts—Non-compliance therewith—Powers of the Income-tax Officer—Entry into assessee's premises, if lawful—Forcible ejectment, not an offence—Indian Penal Code, Sec. 99.

Under Sec. 22 (4) of the Income-tax Act, an Income-tax Officer is empowered to serve upon an assessee a notice to produce his accounts, but there is no provision of law by which he could insist upon production, if the assessee declined to comply with the notice. The proper procedure to be followed in that event is laid down in Sec. 23 (4) of the Act.

Where the Income-tax Officer entered on the premises of the assessee to inspect the accounts and on his continuing to remain therein after being called upon to leave the premises, was forcibly turned out.

Held, that the assessee was exercising his right of private defence under Sec. 99 of the Indian Penal Code, as the Income-tax Officer's proceedings were wholly irregular and he was not acting in good faith under colour of his office.

Aziz Ahmad and Balwant Rai, for the petitioners.

Anant Ram, for complainant.

Nemo, for Crown.

JUDGMENT.

MARTINEAU, J.:—The petitioners, who have been charged by a Magistrate at Karnal with offences under sections 353 and 147, Indian Penal Code, apply to have the charges quashed on the ground that the statement of *Sardar Gurbakhsh Singh*, on whose report the proceedings against them were initiated, shows that they committed no offence.

The material facts as they appear from the statement in question are as follows. *Sardar* Gurbakhsh Singh, who is an Income-tax Officer, went on the morning of the 13th January last to inspect the accounts of the cotton factory belonging to the firm of Rikhi Ram-Kundan Lal at Kaithal, with a view to assessing the firm with income-tax. He went into the factory, where he met *Lala* Achhru Ram and *Lala* Ram Gopal, sons of the proprietors of the factory. He asked *Lala* Ram Gopal to show him the accounts, and *Lala* Ram Gopal went into the office room and brought out three books, which he handed to the Inspector who was with *Sardar* Gurbakhsh Singh, and the Inspector made them over to the orderly. *Sardar* Gurbakhsh Singh then proceeded with the Inspector, the orderly, and *Lala* Ram Gopal towards the gate with the object of examining the books at the Dak Bungalow. *Lala* Achhru Ram, however, called *Lala* Gopal and spoke to him, and the latter then came back to *Sardar* Gurbakhsh Singh and said they could not show the books in the absence of the *munim* and asked to be given a few days' time. *Sardar* Gurbakhsh Singh agreed to give time till the 21st or 22nd January, but asked *Lala* Ram Gopal to make a statement with regard to the date or to put in a formal application so that the time might be extended. *Lala* Achhru Ram said that they would not do this, and asked for the return of the *Bahis*, which he said *Sardar* Gurbakhsh Singh had no power to take. *Sardar* Gurbakhsh Singh remonstrated with him and *Lala* Ram Gopal, but to no purpose, and he then got the Inspector to draw up an order under section 37 (b) of the Income-tax Act, in which they were required to produce at once all the accounts for the years 1922-23 and 1923-24 for examination. The order was presented to *Lala* Achhru Ram and *Lala* Ram Gopal, but they refused to take it, and on its being read out to them, *Lala* Achhru Ram forcibly took the three *bahis* from *Sardar* Gurbakhsh Singh's orderly. *Sardar* Gurbakhsh Singh told the Inspector to go and ask the Deputy Superintendent of Police to make *Lala* Achhru Ram and *Lala* Ram Gopal understand their legal position. The Inspector went away, while *Sardar* Gurbakhsh Singh and the orderly waited at the factory. *Lala* Achhru Ram ordered *Sardar* Gurbakhsh Singh to leave the factory. The latter replied that he would not leave as he had come there in the discharge of his official duties. *Lala* Achhru Ram repeated his order once or twice, and then called a number of *palladars* and got them to turn *Sardar* Gurbakhsh Singh out by force. It is that forcible ejection of *Sardar* Gurbakhsh Singh from the premises that forms the basis of the charges framed by the Magistrate.

Now although *Sardar* Gurbakhsh Singh was empowered under section 22 (4) of the Income-tax Act to serve the proprietors of the firm with a notice to produce their accounts, there is no provision of law by which he could insist on their producing the accounts if they declined to comply with the notice, but the procedure to be followed in that event is laid down in section 23 (4) of the Act. Nor had *Sardar* Gurbakhsh Singh any authority under the Act to enter the firm's premises in order to inspect the accounts, or to remain on the premises for that purpose against the will of the proprietors. He put himself in the wrong in two ways after *Lala* Achhru Ram had taken back the account books from the orderly, first, by sending for the Deputy Superintendent of Police with the apparent intention of intimidating *Lala* Achhru Ram, and, secondly, by remaining on the premises after *Lala* Achhru Ram had told him to leave. His act appears to have amounted to criminal trespass, and *Lala* Achhru Ram was within his rights in forcibly turning him out when he refused to leave. Section 99 would not deprive *Lala* Achhru Ram of his right of private defence, as *Sardar* Gurbakhsh Singh's proceedings were wholly

illegal, and he was not acting in good faith under colour of his office. On this point see *Haq Dad v. Crown*(1).

Holding therefore that the petitioners committed no offence I accept their application and quash the charges framed by the Magistrate.

[157] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[12th January, 1926.]

The Commissioner of Income-tax, Madras ...

Referring Officer.

v.

- (1) Mothay Ganga Raju
- (2) Mothay Narasimha Rao
- (3) Mothay Narayana Rao
- (4) Mothay Krishna Rao

... .. Assesseees.*

Income-tax Act (XI of 1922), Sect. 66 (2)—Assesseees separately assessed—One application and one fee for stating a case—If sufficient—Subsequent allocation to one assessee—Expiry of one month—Power to extend time.

The assesseees, separated members of a family and separately assessed, put in one application accompanied by a fee of Rs. 100 under Sec. 66 (2) of the Income-tax Act for statement of a case by the Commissioner of Income-tax. Thereupon the Commissioner intimated to their Vakil that there must be either four separate applications with an additional fee of Rs. 300, or the individual assessee must be specified for whom a case might be stated. After the expiry of the period of one month specified in the section, the assesseees' Vakil wrote to the Commissioner requesting him to treat the application and fee as made and deposited by the assessee named by him.

Held, (1) that the application as originally sent in was defective as it was not competent for four separately assessed persons to come with their application for stating a case in one document and that their case must be separately stated with a separate fee for each separate assessment under the Act; (2) that under the circumstances of the case, there was no proper application before the Commissioner for his taking action in the case of one of the applicants; and (3) that there is no provision in the Act for any Officer or even for the Court to extend the time prescribed by the section.

Case [Referred Case No. 9 of 1925] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Madras, in his letter No. 394 of 1924 dated 26th March, 1925 for the opinion of the High Court.

CASE.

As ordered by the Hon'ble Mr. Justice Kumaraswami Sastri in his order dated 17th March 1924, a copy of which was communicated to me by the pleader for the petitioners on the 27th January 1925, I have the honour to submit the following questions for the decision of the Hon'ble the Judges of the High Court:—

I. Whether four separate applications and deposits are necessary in this case for requiring the Commissioner to take action under section 66 (2) of the Act.

II. If the answer to the question (1) is in the affirmative, whether there was no proper application before the Commissioner for his taking action in the case of one of the applicants.

* (1927) 52 M L J 273; 25 L W 321; 38 M L J (H C) 109; (1927) M W N 171; 100 Ind. Cas. 291.

1. (1925) I L R 6 Lah. 392.

III. Whether there is any question of extending the period in this case and whether the Commissioner has no discretion in the matter.

IV. Whether section 34 of the Act covers a case where the Assessing Officer and the Commissioner in appeal held, after full investigation, that a certain income was not taxable in the hands of a particular individual but was to be included in the taxable income of a partnership of which he was a partner and it was subsequently held in proceedings relating to the partnership (to which the original assessee, was not a party) that the partnership was not taxable on this amount and whether such assessment does not amount to an indirect review of the Commissioner's original proceedings not warranted by the Act.

V. Where, after dissolution of partnership, interest on the capital of the business up to date of dissolution was paid to retiring partners by another partner who took over the business, whether the partner who took over the business is not taxable on the amount of such interest under note 5 (b) (III) of the rule 19 printed at page 54 of the Manual* and section 26 of the Act and whether the fact that the payment could not be made till after dissolution makes it any the less a payment to a partner.

VI. Whether it is permissible to review considered proceedings of the Commissioner on the strength of other proceedings to which the original assessee was not a party.

VII. Whether the ruling of the Commissioner, that the share of profits of a joint concern transferred to an individual at partition would not be income in his hands, does not govern the present case and whether the circumstances adverted to in paragraph 4 of the proceedings, assuming them to be correct, would render the said ruling inapplicable.

2. The petitioners in this case are Messrs. (1) Mothay Gangarazu, (2) Mothay Narasimha Rao, (3) Mothay Narayana Rao, and (4) Mothay Krishna Rao, who were assessed till 31st March, 1921 as a joint family but have since that date been treated as four separate assessees and been individually assessed owing to the partition of the family in April, 1921. The total amount of tax involved in this case is Rs. 2,082-2-0 divided among the four individuals.

3. In setting forth the facts of the case it will be necessary for me to enter in some detail into the history of various assessees:—

(a) The first of these is the unregistered firm consisting of Mothay Gangarazu and Majeti Veerabhadra Rao. In 1919-20 the taxable income for the previous year was held to be Rs. 16,233. A final tax of Rs. 760-14-9 was therefore imposed for 1918-19 and a provisional tax of the same amount for 1919-20 under sections 18 (3) and 20 of the Income-tax Act, VII of 1918. In the course of the assessment proceedings for 1920-21 the firm returned a nil income and one of the partners Majeti Veerabhadra Rao deposed on oath on behalf of the firm that the business was closed in April 1919 and that there were no sales in 1919-20. The Income-tax Officer, Ellore, accepted this statement and as no income was earned in 1919-20 he refunded the provisional tax of Rs. 760-14-9 collected for that year. Subsequent to this date this firm has not been assessed at all by the Income-tax authorities.

(b) *Majeti Veerabhadra Rao*.—In 1922-23 the Collector of Kistna assessed this individual on his previous year's income of Rs. 33,516. One item which was included by the Collector in the assessee's taxable income was a sum of Rs. 19,079 paid as interest to the Mothay family on 17th August 1921. Majeti Veerabhadra Rao had been a partner with Mothay Gangarazu in the

firm mentioned above. That firm had been dissolved in April 1919. On the 16th April 1919 Majeti Veerabhadra Rao had purchased in auction all the goods of the firm for Rs. 67,050 and executed a promissory note for this sum in favour of the partners of the old firm, viz., Mothay Gangarazu and Majeti Veerabhadra Rao. From 16th April, 1919 to 17th August, 1921 the firm conducted no trade but merely realised the outstandings due to it. On 17th August, 1921 it was found that the old firm had to pay to the Mothay family Rs. 28,345 on account of money advanced by it to the firm and the interest due thereon. Veerabhadra Rao executed a promissory note in favour of the four members of the Mothay family for this amount. Of the total sum included in the promissory note Rs. 19,079 represented interest. The Collector of Kistna taxed this sum in the hands of Veerabhadra Rao holding that the old firm had continued to exist until October, 1921 and that Veerabhadra Rao had only succeeded to the business of the firm about that date. The Collector therefore held that under section 26 Veerabhadra Rao was liable for the tax payable in respect of this business and that as Rs. 19,079 was paid as interest to the Mothay family on 17th August 1921 when the partnership subsisted this interest paid to a partner was not an admissible deduction. Veerabhadra Rao appealed against this order of the Collector and my predecessor upheld the assessment. The party thereupon addressed a review petition under section 33 to me together with an application for a reference to the High Court under section 66. It was urged by the party that the interest of Rs. 19,079 should be omitted from the taxable income of Majeti Veerabhadra Rao on the ground that the firm of Mothay Gangarazu and Majeti Veerabhadra Rao had ceased to exist in April 1919 and that the Collector's finding on this point of fact was incorrect. I came to the conclusion that the party's contention was right and I reduced his taxable income by Rs. 19,079.

(c) *The Mothay family*.—In 1919-20 this undivided family had been taxed on an income of Rs. 194,768 earned in the previous year 1918-19; in 1920-21 assessment had been made on Rs. 179,705. In these years the assessment included interest on advances made by the Mothay family to the firm of Mothay Gangarazu and Majeti Veerabhadra Rao. The inclusion of the interest on these sums indicate that the family was not a partner in the firm, for, if it had been, such interest would have been taxed as part of the profits of the firm and not in the hands of the family. In the assessment for 1921-22 the joint family was taxed on the accrued income earned by it during 1920-21; but in appeal it was directed that the cash basis should have been adopted. As a result no interest was charged on the advances made by the family to the firm because nothing had actually been paid as interest on such advances in the year of account. It is in connection with the assessment of the individuals comprising this family for 1922-23 that the present reference has arisen. The family having become divided from April 1921 the Collector for the year 1922-23 assessed each of the members individually. The four individuals appealed against the Collector's assessment order and each of the four appeals was disposed of separately by the Commissioner of Income-tax in February 1923. Although a sum of Rs. 19,079 has been paid as interest to the Mothays in August 1921 by Veerabhadra Rao, the Collector did not include this item or any portion of it in the assessable income of the four members of the family as he had already taxed it for 1922-23 in the hands of Veerabhadra Rao. After I had decided under section 33 in July 1923 to exclude this sum of Rs. 19,079 from Veerabhadra Rao's assessable income, the Collector of Kistna issued four notices under section 34 of the Act to the four members of the Mothay family requiring them to show cause why they should not be assessed on their share

of the interest of Rs. 19,079. After hearing their objections he decided to assess them separately on the interest which each individual had received. Mothay Gangarazu had received Rs. 2,809, Narasimha Rao Rs. 2,809, Narayana Rao Rs. 1,405 and Krishna Rao Rs. 1,405, making a total of Rs. 8,428. The whole sum of Rs. 19,079 was not taxed because it was found that Rs. 6,292 had been taxed in 1919-20 and Rs. 4,359 had been taxed in 1920-21, as the assessment of the family was made on the accrued basis in these years. Four separate demand notices under section 29 of the Income-tax Act were issued to the four assesseees. Against the Collector's order the four assesseees appealed to me sending one appeal petition. Strictly speaking there should have been four separate petitions; but I condoned this defect, heard the appellants' representative and passed four appellate orders No.365, 367, 368 and 369 dated 18th January, 1924. A copy of one of these orders is enclosed. My chief reason for holding that the Mothays and not Veerabhadra Rao were assessable on the interest of Rs. 8,428 was that I considered that the firm of Mothay Gangarazu and Majeti Veerabhadra Rao had been dissolved in April, 1919 and not in October, 1921. In coming to this decision I was influenced by

(i) the petition dated 9th May, 1920 which accompanied the D return of the old firm for 1919-29 in which it is definitely stated that the old firm closed business from March, 1919;

(ii) the sworn deposition of one of the partners of the old firm Majeti Veerabhadra Rao dated 31st March, 1921;

(iii) the fact that the provisional tax for 1919-20 had been refunded to the partners of the old firm on the ground that the old firm had ceased to exist in March 1919; (iv) the evidence given by Majeti Veerabhadra Rao on 28th November, 1922 and on 8th March, 1923. The Collector of Kistna had held that the firm continued its business until October, 1921 because it was collecting outstandings and because the actual settlement of accounts as between the partners took place only in October, 1921. Now the old firm had kept its accounts on the mercantile basis. That being so, I held that the firm should be considered to have stopped its business from the date on which it ceased to engage in trade and incurred no further credits or liabilities. The mere collection of debts and repayments of liabilities of a business which had ceased trading and which had kept its accounts on the accrued basis does not, in my opinion, constitute the continuance of business. No evidence contrary to this view having been adduced by the petitioners either at the assessment stage before the Collector of Kistna or during the appeal stage before me, I came to a different finding of fact from that adopted by the Collector. On receiving copies of my appeal order, the petitioners submitted one combined application requesting that a reference should be made to the High Court on the four points of law numbered IV to VII above. They accompanied their combined application with a single fee of Rs. 100. I declined to admit the application on the ground that the conditions laid down in section 66 (2) of the income-tax Act had not been complied with and I accordingly returned the fee of Rs. 100. Before finally refusing to admit the application I gave the petitioners' vakil a reasonable opportunity for putting in a proper application. See my letters of 13th February, 1924, the Vakil's reply dated 15th February, 1924 but received on the 18th February, my reply of 19th February 1924, vakil's letter of 25th and my reply of the same date, copies of which are enclosed, marked B-1, B-2, B-3, B-4 and B-5*. The petitioners thereupon filed a petition before the High Court praying that a mandamus should be

*Omitted in the present report.

issued requiring the Commissioner of Income-tax to refer to the High Court certain questions of law, which they alleged, arose out of the assessment proceedings. The Hon'ble Mr. Justice Kumaraswami Sastri has thereupon ordered that I should make a reference not only in regard to the four points urged in the original petition to him but on a further set of three other questions, viz., those numbered items I—III in paragraph I above.

4. Before I can express my opinion as directed by the Hon'ble Judge on the seven points referred to me, I venture to submit that it is necessary to settle a preliminary point that arises for consideration. The uncertified copy of the High Court's order that has been communicated to me by petitioners' vakil does not contain any information as to the specific provision of law under which a reference on all the 7 points mentioned in paragraph (1) has been demanded. The notice of motion submitted to the High Court by petitioners' vakil on 4th March, 1924 purports to be made under section 66, sub-clauses (2) and (3) of the Income-tax Act. If the High Court's order be in pursuance of this provision, the following point arises. Section 66 (2) states that within one month of the passing of an appeal order under section 31 or section 32 the assessee in respect of whom the order was passed may by application accompanied by a fee of Rs. 100 require the Commissioner of Income-tax to refer to the High Court any question of law arising out of such order. My difficulty in the present case is that no such application as prescribed by law has been made to me within the prescribed time by any one of the four assesseees or on behalf of any of them. Clause 3 of section 66 states that if, on any application being made under sub-section (2), the Commissioner refuses to state a case on the ground that no question of law arises the assessee may apply to the High Court, and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and refer it. There are thus three conditions precedent to the passing of an order by a High Court under this clause, viz.,

(i) that an application as prescribed under section 66 (2) should have been made to the Commissioner of Income-tax;

(ii) the Commissioner should have arrived at a decision on such an application; and

(iii) the High Court is to be dissatisfied with such decision of the Commissioner.

In the present case there has been before me no legal application of the kind that satisfied the conditions under section 66 (2). If such an application can be held to have been made when the vakil intimated to me by his letter dated 20th February, 1924 (Ex. C) that the fee of Rs. 100 already deposited might be taken as paid by one of the four assesseees, Mr. Mothay Narasimha Rao, that application was received by me after the prescribed period of one month. And further I have not expressed any opinion or given any decision on the four points of law specified in the original application. Reading clauses (2) and (3) of section 66 of the Income-tax Act, together, it seems as if it is necessary in cases where the High Court orders a reference under section 66 (3) that the reference should be only on those specified points on which the Commissioner came to a decision. In the present case there are actually three additional points besides those referred to in the original petition.

5. It is possible that the High Court's order might have been based under some provision of law other than the Income-tax Act. In that case section 45 of the Specific Relief Act seems to be the relevant provision of law that has to be considered. This section states that the High Court of Madras

may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, subject to the five conditions laid down in the provisos thereof being satisfied. Two of these conditions are (i) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, and (ii) that no order can be made under that section if the applicant has other specific and adequate legal remedy. The principle underlying these provisos appears to be that a mandamus will lie to prevent failure of justice upon reasons of public policy, or to correct official inaction or to enforce official function only in cases of last necessity where the usual forms of procedure are powerless to afford relief and where there is no other clear and adequate legal remedy; and in such cases the Court ordering the relief has to be satisfied that the doing of, or forbearing from, the act which it proposes to order is consonant to rights and justice and that such doing or forbearing under any law for the time being in force is clearly incumbent on the official against whom the order is passed. With reference to these provisions I venture to submit that the legal course appears to be for the High Court to consider in the first instance only the question whether I was right in declining to entertain the application for a reference to High Court on the four points of law specifically referred to me; and if so, I would have only to answer at present the 1st, 2nd and 3rd points of law referred to in the High Court's order. If the High Court after considering my statement on these points is satisfied that I was incorrect in rejecting the original application for a reference to the High Court, it might order me to restore that application to my file and dispose of it on its merits in accordance with section 66 (2) of the Income-tax Act. It appears to me to be premature at this stage to state a case on the points of law contained in an application which I have not considered and on which I have not come to a decision as prescribed under section 66 (2) of the Act. However, in obedience to the order of the learned Judge, I give my opinion on the seven points involved.

Question I. Whether four applications and deposits are required in this case for the Commissioner to state a case. I consider that four applications, each of them accompanied by a fee of Rs. 100 should have been made, as section 66 (2) of the Income-tax Act prescribes that each assessee has to pay this fee. There are four assessees in this case, as evidenced by the four separate original assessments made by the Collector of Kistna in December 1922, four separate appeal orders passed by the Commissioner of Income-tax in Income-tax Appeals 70-74 dated 10th February 1923, four separate demand notices issued again under section 29 when the Collector assessed the additional amounts under section 34 in November 1923, and again four separate appeal orders on the appeal against these assessments, passed by me in Income-tax Appeals, 365, 367, 368 and 369 dated 18th January 1924. It is true that the point at issue in the appeals disposed of by me was the same, and that the Collector of Kistna therefore decided by one single order dated 29th October 1923 (this was communicated separately to each of the assessees) to issue additional demands by separate demand notices to these four assessees. It is also true that the Vakil who appeared for the four assessees was one and that I, therefore, issued one notice of hearing for all the four appeals and that I incidentally condoned in that connection the defect in the form of presentation of appeal by permitting one combined appeal petition instead of requiring them to put in four separate appeal petitions. This condonation would not, how-

ever, give to the petitioners any legal right that could have the effect of narrowing or whittling down the operation of a taxing statute, especially when the intention to impose a charge of Rs. 100 upon each assessee is expressed in clear and unambiguous language.

Question II. If the answer to Question I is in the affirmative whether there is any proper application before the Commissioner for his taking action in the case of one of the applicants. To this my answer is that there was no proper application within the prescribed time.

Question III. Whether there is any question of extending the period in this case and whether the Commissioner has no discretion in the matter. The petitioners urge in paragraph 19 of their affidavit that there is no question of limitation in this case. This statement ignores the effect of the amendments to the Limitation Act made by Act. No. X of 1922. Section 66 (2) of the Income-tax Act specifically prescribes a limit of one month from the date of appeal order for submitting to the Commissioner applications for reference to the High Court. Section 29 of the Indian Limitation Act as amended in 1922 contains special provisions in regard to the method of computing the period of limitation for any special law. It will be seen from clause (a), subsection (2) of this section that the time limit prescribed in section 66 (2) of the Income-tax Act is legally operative. It is specifically laid down that only the provisions contained in section 4, sections 9-18 and section 22 of the Limitation Act shall apply in so far as and to the extent to which they are not excluded by special law and that the remaining provisions of the Limitation Act should not apply. Section 5 of the Limitation Act, 1908, which allows discretion to Courts to extend the time in certain cases, is thus inoperative in respect of Income-tax appeals and applications which have to be dealt with for purposes of limitation under the special rules contained in the Income-tax Act itself. It may be seen from sections 27 and 30 (2) of this Act that a certain discretionary power is allowed only in some specific cases of assessments and appeals; but there is no provision that enables the Commissioner to extend the time limit prescribed in section 66 (2). The position therefore seems to me to be that in the present case it was not clearly incumbent on me to make the application on the four points of law propounded by the petitioners and that no mandamus lies against me under section 45 of the Specific Relief Act.

Question IV. Whether section 34 of the Act covers a case where the Assessing Officer and the Commissioner in appeal held, after full investigation, that a certain income was not taxable in the hands of a particular individual but was to be included in the taxable income of a partnership of which he was a partner and it was subsequently held in proceedings relating to the partnership (to which the original assessee was not a party) that the partnership was not taxable on this amount and whether such assessment does not amount to an indirect review of the Commissioner's original proceedings not warranted by the Act. I hold that section 34 does cover the case of additional assessments such as the present ones. It relates to income profits or gains which for any reason have escaped assessment. The interest paid by Majeti Veerabhadra Rao had escaped assessment owing to my decision under section 33 and therefore had to be taxed in other hands. As Commissioner I had full power under section 33 to review the original proceedings of my predecessor passed in his capacity as Assistant Commissioner under Section 31.

Question V. Where, after dissolution of partnership, interest on the capital of the business up to date of dissolution was paid to retiring partners by another partner who took over the business, whether the partner who took

over the business is not taxable on the amount of such interest under note 5 (b) (III) of the rule 19 printed at page 54 of the Manual and section 26 of the Act and whether the fact that the payment could not be made till after dissolution makes it any the less a payment to a partner. This is the main point dealt with in my order in Income-tax Appeals Numbers 365-369. I had there recorded two findings of fact, viz., that the firm of Mothay Gangarazu and Majeti Veerabhadra Rao had definitely ceased to exist in April 1919 and that the Mothay family had not been a partner in the firm of Mothay Gangarazu and Majeti Veerabhadra Rao. In the face of these findings of fact it seems to me clear that the payment by Majeti Veerabhadra Rao to the members of the Mothay family in August 1922 cannot be held to be a payment by Majeti Veerabhadra Rao to the partners of his firm. Section 26 has no application to the present case because the firm of Majeti Veerabhadra Rao had not undergone any change in its constitution in the year of account 1921-22, or in the year of assessment, 1922-23. He alone had been carrying on the cloth business since April 1919. Therefore a payment made by him in August 1921 to people who were not then partners in his firm had to be admitted as an expenditure incurred by him in connection with his business.

Question VI. Whether it is permissible to review considered proceedings of the Commissioner on the strength of other proceedings to which the original assessee was not a party. It is certainly permissible for an Officer acting as Commissioner under section 33 to review proceedings passed by his predecessor in his capacity as Assistant Commissioner under section 31. Section 33 contains no limitations on the powers of a Commissioner. Indeed it specifically empowers him to review the orders which he himself has passed as Assistant Commissioner. In disposing of the petition of Majeti Veerabhadra Rao I could not possibly have issued notice to the present petitioners because the assessment of Majeti Veerabhadra Rao was at that stage confidential as between him and me.

Question VII. Whether the ruling of the Commissioner, that the share of profits of a joint concern transferred to an individual at partition would not be income in his hands, does not govern the present case and whether the circumstances adverted to in paragraph 4 of the proceedings, assuming them to be correct, would render the said ruling inapplicable. A ruling by one Commissioner does not necessarily bind any other Commissioner and there is no such thing as "Case law" in regard to orders of Income-tax Officers. These orders until they reach a Court are of a confidential nature. It is perfectly open to an Income-tax Officer in an extreme case to apply different treatment to different assesseees. He may, for instance, give a concession to an honest assessee which he would refuse to others. In this case my decision that the interest in question was taxable was based on the evidence supplied by assessment records that the interest due by Majeti Veerabhadra Rao could not have been included in the family assets at the time of partition and therefore could not partake of the nature of capital.

T. Ramachandra Rao, for the assesseees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

COUTTS TROTTER, C. J.—On the direction of the learned Judge several separate questions have been framed for our determination. In our opinion the answers to the first three dispose of the whole matter and preclude us from going into the others. The first question is whether four applications are necessary in this case for taking action under section 66 (2) of the Act.

That is the section which says that the Income-tax Commissioner is to state a case when a proper application is made accompanied by the proper fee which is Rs. 100 as matters stand. These applicants were four persons. They had once been an undivided family and, had they remained so, different considerations might arise but they had in fact been separated and they were separately assessed. Nevertheless an attempt was made to have a case stated regarding them but on a single fee of Rs. 100. That of course was an impossible attitude to take up and as they were divided the result was that it was an application by four people each of whom, as my learned brother put it, can be deemed to have paid one fourth of the prescribed fee. I dislike technical objections of this kind but I have no sympathy with the applicants because they were expressly told, or their vakil was expressly told, the position by a letter from Mr. Strathie, the Commissioner, dated 13th February. He points out "only one sum of Rs. 100 is deposited. There were, however, separate assessments and four appellate orders." Under section 66 (2) each assessee must put in a separate application and each must deposit the prescribed fee of Rs. 100. I cannot therefore act on the present application." Then he goes on "If you wish me to deal with all the cases, will you please send four separate applications and an additional Rs. 300? If, however, you are willing that only one case should be dealt with and if you tell me with which case you wish me to proceed, I shall treat the Rs. 100 as having been received from that individual." Nothing could be more reasonable than that and the assessee's vakil could have put the whole matter right by accepting one of those two alternatives. Instead of that the vakil sends an answer saying that, as all the questions were common to the four applicants, a reference in one will necessarily cover the case of all. Then he says he writes to his client. He must have known time was passing and in the result the time had elapsed before he communicated with his client and ascertained his decision as to which of the two alternatives he would accept. Thereupon Mr. Strathie wrote the letter of the 19th February in which he says that the time is gone for his reply, that the reply was in any case evasive (as indeed it was) and he declined to take any further action in the matter. Thereupon penitent too late, the vakil writes a letter at once requesting that the Rs. 100 sent with the application should be treated as deposited on behalf of M. Narasimha Rao, and that a reference may be made in his case leaving the other people over. That is the position and our answer to the question must be that the application as originally sent was defective and that the fee that accompanied, even if the application was in order, was insufficient. It is not really competent for four separately assessed persons to combine their applications for a case stated of this sort in one document. But, assuming that this may be as all the points are the same, it is obvious that as they were separately assessed they must be separately stated and they must pay a separate fee of Rs. 100 for each separate assessment under the Act.

Then the next question is if the answer to question (1) is in the affirmative, as it has now been answered in the affirmative, whether there was no proper application before the Commissioner for his taking action in the case of one of the applicants. The answer is "No. He had offered to do that and his offer was not accepted".

The third question is whether there is any question of extending the period in this case and whether the Commissioner had no discretion in the matter. The answer is the statute fixes a time and it is an obviously undesirable burden to cast on the Income-tax Commissioner to put upon him the consideration of questions as to whether he should exercise discretion in the direction of leni-

ency in one case and not another. The statute is express and there is no provision in the statute for any official or even for the court to extend the time. Therefore, as our answers to the first three questions are what I have outlined, the remaining questions which, I suppose, raise the merits we are unable to deal with. Rs. 150 will be allowed for costs of Government.

KRISHNAN, J. :—I agree.

BEASLEY, J. :—I agree.

[158] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[12th January, 1926.]

The Commissioner of Income-tax, Madras Referring Officer.
v.

Mutha Sarvarayudu Assessee.

Income-tax Act (XI of 1922), Sec. 13—Assessment on book debts as actually received—Actual receipt in cash in subsequent year—Liability to be assessed in year of receipt—Double assessment.

If an assessee had been assessed to income-tax in respect of book debts owing to him in one year as actually received by him, he could not again be taxed on the same sums of money when they were actually received in cash in a later year of assessment. A man cannot be taxed twice over in respect of the same sums.

Case [Referred Case No. 21 of 1924.] stated under section 66 (3) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Madras, in his letter No. 3332 of 1923 dated 27th November 1924, for the opinion of the High Court.

CASE.

As ordered by the Hon'ble Mr. Justice Devadoss under section 66 (3) of the Income-tax Act I have the honour to submit the following question for the decision of the High Court:—

“Where computation of the income, profits and gains for a particular year are made as directed in the proviso to section 13 of the Income-tax Act of 1922, are any income, profits or gains which accrued during that year but received subsequently, liable to be assessed as income for the year during which it is received?”

2. In stating a case to the High Court I am required by the Act section 66 (1) and (2) to give my own opinion thereon. My first difficulty is that it is impossible to give a direct answer in the negative or in the affirmative to the question as stated. The answer must depend on the circumstances of the case. To make my position clear it is necessary for me to explain in some detail my conception of the effect of the proviso to section 13.

3. Under section 13 of the Act income, profits and gains are to be computed in accordance with the method of accounting regularly employed by the assessee, subject to the proviso that if no method of accounting has been regularly employed, or if the method employed is such that in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom, then the computation shall be made on such basis and in such manner as the Income-tax Officer may determine.

4. It will be observed, in the first place, that the law leaves to the Income-tax Officer the decision of the question whether the income, profits

and gains can properly be deduced from the accounts, and gives him a very wide discretion in regard to the method of computation to be adopted when in his opinion they cannot be so deduced or when *no method has been regularly employed* by the assessee. The question whether the income can be properly deduced from the accounts is evidently a question of pure fact. The question whether any method of accounting has been regularly employed by the assessee is, I venture to submit, also a question of fact. If the assessing and appellate authorities decide that the facts are such that the case falls within the proviso to section 13, I submit that no question of law can arise in regard to the exercise of the discretion vested in them by the Act as to the basis on and manner in which the income should be determined. If they estimate the assessee's capital, for example, to be so much, and assume his income to be such a percentage on that capital, and assess him accordingly, I respectfully submit that no question of law can arise in regard to such estimate, assumption, and assessment, unless of course they should run counter to some specific provision of the Income-tax Act, for example, if they should explicitly take into account some class of income that the Act specifically exempts from the tax.

5. There are two main systems of accountancy according to which profits are ordinarily computed by business men and others. The first of these is the mercantile or "commercial system," according to which the profits are arrived at by striking a balance between sums that have fallen due to the business (credits) and sums that have fallen due by the business (debits). Actual receipts and expenditure are not taken into consideration at all on this system. If a sum due to the concern for which credit has been taken is ultimately found to be a 'bad debt' it is written off, that is, the original credit is "reversed" by a corresponding debit. This system of calculating profits by balancing receipt due and payments due, instead of sums received and payments made, is not peculiar to the Income-tax Department but is the ordinary business practice most commonly followed by large business concerns and universally followed by companies.

6. The other system is the "cash system," according to which actual receipts are balanced against actual expenditure. This is followed by a considerable number of Indian businesses, especially money-lenders. I would invite their Lordships' attention to sub-section (3) of section 10 of the Indian Income-tax Act where there is a specific reference to these two methods of accountancy, the method according to which payments (and receipts) that have fallen due are taken into account and the method according to which sums actually paid (and received) are taken into account.

7. These preliminary observations, for the length of which I must apologise, will make intelligible the submissions that follow. I conceive the answer to the question propounded by the Hon'ble Mr. Justice Devadoss to be as follows:—"The answer to this question depends on a variety of circumstances. Subject to a preliminary submission that it appears to be a question of accountancy, my opinion is as follows:—If the assessee has regularly adopted the "Commercial system" of accountancy he will be assessed in each year on a balance struck between the sums that have fallen due to him in the previous year and the sums that have fallen due by him in the previous year, from which balance "bad debts" written off will be deducted; and the question propounded cannot possibly arise, because according to the system of accountancy under consideration the fact and the time of receipt are alike entirely irrelevant. The account is not based on receipts and expenditure, but on 'credits' and debits,' not on sums actually paid in or paid out, but on sums that have fallen due to the assessee and sums that have fallen due by the assessee.

8. "If, on the other hand, the assessee has regularly adopted the 'cash system' of accountancy it is equally true that the question cannot arise. The income each year will be computed on the balance between the sums actually received during the previous year and the sums actually paid during the previous year, the time when any sum 'accrued' or fell due, whether to or by the assessee, is entirely irrelevant, since the basis of computation is not credits and debits but actual receipts and outgoings.

9. "If again the assessee changes his system of accountancy, from the commercial to the cash system or *vice versa*, he falls within the proviso to section 13. He cannot be then said to have "regularly employed" any system of accountancy. In my opinion the law gives the Income-tax Officer full discretion in such a case to determine the basis on which and the method by which the income should be determined. It is impossible to give any general answer to any question as to the principles that should guide the Income-tax Officer in such a case, on the assumption that such a question is a question of law, but I may mention that the departmental practice is not to tax a second time any sum that is shown to have been taxed already. When an assessee changes from the "cash" to the "commercial" system no question like that propounded can ordinarily arise, since sums are not likely to be received before they have fallen due or accrued. Where the assessee changes from the commercial system to the cash system, it is quite likely that sums that came into account in a previous year under the commercial system having become due to or by the assessee in that year, may be actually received or paid by the assessee in a later year. The Income-tax Officer has full discretion under the law to treat such sum according to the system of accountancy followed in computing the income of the previous year. No doubt that discretion is to be exercised in accordance with equity and natural justice. Hence as a matter of practice sums will not be taken into account in one year if they are proved to have been taken into account in a previous year, whether they be incomings or outgoings.

10. "If the assessee has never followed any regular system of accountancy, even spasmodically or intermittently, the Income-tax Officer has full discretion as a matter of law to determine the assessee's income in any particular year on such basis as he deems equitable. As a matter of practice having no explicit basis in the statute any sum that is shown to have been taxed once is not taxed again."

11. There is however, a second difficulty to which it is my duty to invite their Lordship's attention. The order of the Hon'ble Mr. Justice Devadoss implies, of course, that the question of law that he has directed me to refer to the High Court does as a matter of fact arise in the case under consideration. That is, it implies that in the case under consideration profits or gains that had accrued and were assessed in a previous year have been assessed as income of a subsequent year in which they have been received. Whether this is so is a question of pure fact, and as such it is one for me to determine. My decision in regard to this question of fact is that in the case under consideration no profits or gains that accrued and were assessed in a previous year have been assessed a second time in a subsequent year in which they were actually received.

12. It is no doubt my duty, however, to place before their Lordships the materials on which this finding of fact is based.

13. It will now therefore be necessary for me to enter in some detail into the history of the assessments of the assessee in question. Up till 1922-23 the assessee Mr. Mutha Saravarayudu of Cocanada was assessed under a deed of composition for 3 years on an income of Rs. 30,000. This agreement of

composition expired in 1921-22. A fresh assessment therefore had to be made in 1922-23 on the income of 1921-22. As the accounts produced by the petitioner for that year were held to be incomplete, he was assessed on an estimated income from money-lending of Rs. 68,000. In arriving at this estimated income of Rs. 68,000, the Collector took the assessee's working capital at Rs. 8.50 lakhs and assumed that an average of 8 per cent. interest on this capital would give the assessee's income. During the assessment proceedings for 1923-24 on the income of 1922-23 the assessee's accounts were accepted. From these accounts the assessee's total income on the "cash basis" of assessment was held to be Rs. 80,070. The petitioner appealed against that assessment, which had been made by the Collector of Godavari, to the Commissioner. In his appeal he claimed that a sum of Rs. 32,351 should be deducted from his assessable income, on the ground that it represented income realised in the year of account, but really relating to previous years. He claimed that as he had been assessed in previous years either under an agreement of composition or on an estimate, the sum of Rs. 32,351 should be presumed to have been included in the assessment of these years, and should therefore be excluded from the assessment of 1923-24. The Commissioner in his orders on the appeal declined to admit the sum of Rs. 32,351 as a deduction, but deducted Rs. 5,542, on the ground that the accounts showed that that sum had actually been received prior to the year of account. After the appeal the assessee put in an application under section 66 (2) requesting the Commissioner to refer to the High Court the following question of law:—

"Whether section 13 of the Income-tax Act operates as a bar for relieving an assessee from being taxed twice over for the same income, under circumstances, where the assessee was taxed on the income as fully realised during the previous year on estimate, but, as a matter of fact, the assessee realised the interest for the previous year only during the accounting year as shown by his accounts."

The Commissioner declined to make the reference on the ground that no question of law arose. The assessee then appealed to the High Court under section 66 (3). The High Court, by its order dated 29—1—24 but received by the Commissioner on 12th September, 1924, required the Commissioner to state the case in the terms mentioned above. In his judgment the Hon'ble Mr. Justice Devadoss has held firstly that there is no substance in the contention of the assessee in respect of that portion of his 1922-23 receipts which related to the composition period 1918-1921. His Lordship has held this amount to be about Rs. 4,000 and has therefore excluded it. As regards the remaining sum of about Rs. 28,000 His Lordship has remarked that Mutha Saravarayudu was assessed for the year 1922-23 on the mercantile basis, i.e., on the amount which accrued to him, although it was not at all received, and that there are therefore *prima facie* grounds for believing that in respect of the sum of Rs. 28,000 he has been assessed twice. His Lordship therefore holds that a question of law arises in the case and that the petitioner is entitled to have that question determined by the High Court. He has therefore directed me to refer the question already stated for the opinion of the High Court.

14. When the judgment of the Hon'ble Mr. Justice Devadoss was received, my predecessor felt that he could not make the reference immediately owing to the inconsistency between the figures mentioned in the judgment and those which this Department had previously understood to be in dispute. In the High Court judgment it was mentioned that the sum disputed was Rs. 32,357-1-10. Of that sum about Rs. 4,000 was held to be covered by the composition years and was therefore excluded. The balance of Rs. 28,000 approximately was held to be in dispute. Now in the appeal the assessee had

claimed a deduction of Rs. 32,351. Out of that sum the Commissioner had already allowed a deduction of Rs. 5,542, so that the balance in dispute appeared to be Rs. 26,809, some portion, stated by the Judge to be about Rs. 4,000, had to be excluded as relating to the years of composition. There was no clear indication as to how the Judge had arrived at the approximate figure of Rs. 4,000. To ascertain this, the assessee's accounts for 1921-22 were called for and re-examined in this Office. From these accounts it was found that the sum relating to the years of composition was Rs. 4,893. The sum in dispute therefore appears to be Rs. 32,351 *minus* the Rs. 5,542 allowed on appeal *minus* Rs. 4,893, *i.e.*, Rs. 21,916. The assessee and his Pleader definitely accept this as the figure really at issue. Besides clearing up the question of the disputed figure, the recent re-examination of accounts in the Commissioner's Office has yielded most important results. It is found that the actual amount received in cash as interest by the assessee in 1921-22 was Rs. 75,995-14-2 *plus* certain receipts which are not fully explained in the accounts. These uncertain items are payments made by Motha Venkanna, A. Seetharama Raju and Tharma Rayaningaru. The payments are not clearly demarcated as principal or interest, nor are the dates of payment quite clear. But as regards Motha Venkanna Rs. 44,170 was received in 1921-22 and of that sum Rs. 1,850 is shown as interest for the period 1—4—21 to 1—11—21. Some of the remainder is interest for an earlier period. As regards Seetharama Raju Rs. 5,424 was received in 1921-22. There is no allocation between principal and interest for the period, but a total receipt of Rs. 32,904 between 26—4—16 and 1—8—22 is distributed as follows:—Rs. 27,196 to interest and Rs. 5,708 to capital. As regards Tharma Rayaningaru Rs. 3,263-15-0 was received, but the amount of interest therein included is unknown. On the whole therefore it is perfectly certain that at least Rs. 75,995 *plus* Rs. 1,850 or Rs. 77,845 was received as interest by the assessee in 1921-22. These figures were put to the assessee and he was asked to explain them. His answer is that out of the interest received in a year, only the interest relating to that year is liable to assessment. He argues that the interest of previous years has become merged in capital, *e.g.*, to take one case, *viz.*, the loan to the Rani of Tuni; the original loan was Rs. 1,00,000. At the beginning of 1921-22 owing to non-payment of interest, the loan had amounted to Rs. 1,28,011. In 1921-22 the assessee received Rs. 1,39,099, *i.e.*, the original loan plus Rs. 39,099. The sum of Rs. 39,099 was allotted by him as follows:—Interest from 1—4—21 to 14—7—21 Rs. 11,087, interest for earlier periods Rs. 28,012. The assessee contends that his assessable interest is only Rs. 11,087 and that the balance of Rs. 28,012 is really a repayment of capital. Such a contention is of course absurd.

15. If the assessee's contention were admitted it would mean that by deferring receipt of sums due to him till after the close of the year in which they fell due an assessee taxed on the 'cash' basis would avoid the payment of tax on them altogether. There is no foundation in law, equity, the principles or practice of accountancy or commonsense for so preposterous a claim. If any assessee regularly based his accounts on any such principle the Income-tax Officer would be justified under section 13 (proviso) in deciding that his income could not properly be deduced from his accounts. Any difference between the amount originally lent and the amount finally received is obviously income, profits or gains. Interest cannot lose its character merely because its payment has been delayed.

16. Possibly the assessee is claiming to exclude the sum of Rs. 28,012 as having been taxed before. He does not definitely make this claim, but if he did, it would be ruled out by the observation of Mr. Justice Devadoss that

interest for the compounded period is not to be included as having been taxed before. It being clear therefore that the assessee received Rs. 77,845 in cash as interest in the year 1921-22, I find on the question of fact that his claim that the Collector in assessing him on Rs. 68,000 for 1922-23, included more than the sums actually received falls to the ground. No one can say at this date what was in the Collector's mind, but I find as a fact that the assessment for 1922-23 on the income of 1921-22, far from including both sums received and sums due, did not even include the whole of the sums actually received. The petitioner, through the dishonest way in which his accounts were kept, has actually escaped his true assessment in 1922-23, and he is not entitled to any further relief in regard to his assessment for 1923-24. Under the Act I unfortunately have no power to amend the 1922-23 assessment at this stage.

17. My opinion in regard to the question that I am directed to refer to their Lordships is therefore briefly as follows:—It is impossible to answer the question as framed except with regard to the circumstances of hypothetical cases that might arise. I have detailed in paragraphs 6 to 9 above the different answers that would have to be given in different hypothetical circumstances. But I also find as a matter of fact that the circumstances of the case under consideration are such that the question does not and cannot arise at all.

P. Somasundaram, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The wording of the question as framed gives rise to considerable difficulty which was felt by the Commissioner and is felt by this Court. If it is intended to propound the question whether, if a man has been taxed in respect of book debts owing to him in one year which he has actually received, he can again be taxed on the same sums of money when they are actually received in cash in a later year of assessment, the answer must obviously be 'no'. A man cannot be taxed twice over in respect of the same sums. Unfortunately the learned Judge seems to have overlooked the fact that this question cannot really arise out of the findings of fact in this case which are binding on us, namely, that the man had not been taxed at all on the sums in question until he was sought to be taxed in the year of assessment which is now under consideration. The answer to the question therefore does not and cannot help the assessee in this particular case and we must therefore dismiss the application with costs. Vakil's fee Rs. 150. Costs paid in the Lower Court (Original Side) will be refunded.

[159] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice LeRossignol, and Mr. Justice Martineau.

[29th January, 1926.]

Messrs. Kesari Das and Sons *Assessees.**

v.

The Commissioner of Income-tax, Punjab and North-West
Frontier Province

Referring Officer.

Income-tax Act (XI of 1922) Secs. 13, 22 (4) & 23 (2)—Return by assessee—Non-acceptance by Income-tax Officer—No opportunity to support the return—Arbitrary assessment, legality of—Proper procedure.

Where the assessee submitted a return of their income and produced their accounts in compliance with a notice under Sec. 22 (4) of the Income-tax Act, the Assessing

**(1926) I L R 7 Lah. 138; A.I.R. (1926) Lah. 201; 94 Ind. Cas. 150.*

Officer, if not satisfied with the correctness of the return, should proceed under Sec. 23 (2) by calling upon them to produce their evidence, in support of the return. Sec. 13, proviso would not apply to such a case and an arbitrary assessment without giving them an opportunity to support their return would be illegal.

Case [Case No. 408 of 1924] stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and North-West Frontier Province, for the opinion of the High Court, in compliance with the order of the High Court dated 12th January, 1925.

CASE.

I am required by an order of a Division Bench of the High Court of Judicature at Lahore, dated the 12th January 1925, to "state the case as provided in clause (2) of section 66 of the Act in connection with the points raised in the petition, a copy of which will be sent to the Income-tax Commissioner"

2. The copy of the petition received from the High Court contains four clauses. The first two are statements of fact in regard to the previous history of the petitioners' assessment, and only clause 3 and clause 4 can be regarded as "points raised in the petition", and I will deal with these *seriatim*.

3. The first of these points runs as follows:—

3. "That the Commissioner by orders, dated the 9th February and the 21st May, 1924, in Income-tax Case No. 1034-C. S, for 1923-24 (being the case in question) purported to 'reject' the application filed with him which he had no power to do."

It is difficult to see how this contention can be seriously urged before your Lordships. Sub-section (2) of section 66 of the Act provides for application being made to the Commissioner requiring him to refer to the High Court "any question of law arising out of" any order passed under section 31 or section 32. It is true that the sub-section does not contain any provision for rejecting an application where no question of law arises, but as it is only a question of law that can be referred, it seems to follow *ex hypothesi* that the application must be rejected where no such question of law arises. That this is the interpretation intended to be placed on this sub-section is moreover clear from the provisions of the following sub-section. Sub-section (3) runs as follows:—"If on application being made under sub-section (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee . . . may apply to the High Court." In view of this explicit provision of the law prescribing the procedure when the Commissioner refuses to state a case to the High Court, or in other words rejects a petition requiring him to do so, it is difficult to understand how it can be seriously contended before your Lordships that the Commissioner has no such power. Further I would point out that unless and until the Commissioner has rejected a petition under section 66 (2) the High Court has no jurisdiction to entertain a petition under section 66 (3).

4. The second point, namely, that raised in paragraph 4 of the petition, appears to be merely a repetition in different words of the first point. It runs as follows:—

4. "That it was the duty of the Commissioner within one month to draw up a statement of the case and refer it with his own opinion thereon to this Honourable Court for decision".

I have nothing to add to what I have submitted above. The statute requires the Commissioner to refer to your Lordships any question of law, and where no question of law arises there can, I submit, be no reference at all.

5. In the above paragraphs I have "stated the case as provided in clause (2) of section 66 of the Act in connection with the points raised in the petition." With all respect, however, I would suggest that the law in connection with these points is so self-evident that I cannot believe that the order of the Honourable Judges of the Division Bench intended me to state the case on these points only. Under these circumstances it appears necessary for me to recapitulate the points put forward by the assesseees as question of law in their original petition to my predecessor under section 66 (2), and to state the case thereon.

6. The petition originally submitted to my predecessor under section 66 (2) is dated the 19th January 1924. The first point raised by the petitioners in this petition, on which a reference to your Lordships is claimed, runs as follows:—

(i) Whether when one method of accounting has been regularly employed for many years a bare finding by the Income-tax Officer that no regular accounts have been produced is legally sufficient to entitle the Income-tax Officer to compute on an arbitrary basis under section 13 of the Act.

I would submit at the outset that the above so-called "question of law" contains two assumptions of fact, to wit:—

(i) that a specific method of accounting has been regularly employed for many years,

(ii) that the only consideration given to the assesseees' accounts by the Income-tax Department consisted of a bare finding by the Income-tax Officer that no accounts were produced.

In a reference to your Lordships on questions of law it is not necessary for me to deal with questions of fact. I would, however, note in passing that I find that in every assessment order from that for the year 1919-20 onwards a reference is made to the accounts produced by the assesseees being incomplete and unsatisfactory, and that in the course of the assessment now called in question the assesseees' books were examined by two accountants prior to assessment, and by a third before the order rejecting the appeal was passed. It is the considered opinion of my predecessor and of myself on the question of fact that, so far at any rate as the books produced for inspection by the Income-tax Department are concerned, no method of accounting has regularly been employed by the assesseees, and that the books produced are such that the income, profits and gains cannot properly be deduced therefrom.

The question of law to be extracted from the point raised by the assesseees is therefore as follows:—

Whether, when the assessee is found not to have employed regularly any method of accounting and to have produced incomplete accounts such as that the income, profits and gains cannot properly be deduced therefrom, the Income-tax Officer is entitled to compute the profits in accordance with section 13

This question is so directly answered by section 13 of the Act that I agree with my predecessor that there is really no question of interpretation of law involved which could possibly be referred to your Lordships.

7. The second point in the petitioners' original petition runs as follows:—

(ii) Whether when accounts are produced a bare finding that "no regular accounts have been produced" is legally equivalent to a finding under section 13 of the Act that "the method of accounting is such that the profits cannot be deduced therefrom" and if so, whether under section 23 (3) or otherwise further information should not have been required, evidence recorded and reasons assigned as to the manner in which the accounts are defective."

I confess that I am unable to extract any straightforward question of law out of the above confused sentence.

It is sufficient, perhaps, to call your Lordships' attention in this respect to the provisions of section 13 of the Act which make it clear that whenever "in the opinion of the Income-tax Officer" the income, profits and gains cannot be deduced from the method of accounting, if any, employed by the assessee, the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine."

Without therefore attempting to unravel the tangled skein of the petitioners' involved verbiage, I will content myself with remarking that section 13 becomes operative whenever the Income-tax Officer forms on whatever grounds the opinion that the income cannot be deduced from the accounts.

8. I would invite your Lordships' attention in passing to the fact that the law of England like that of India gives the fullest discretion to the assessing authorities to determine the income as they think fit where the assessee has failed to adduce satisfactory evidence. It will be sufficient perhaps to quote the words of the Lord President of the Court of Sessions in the case of *Macpherson & Co. v. Moore* (1). "Messrs. Macpherson & Co., . . . if they do not choose, as they have not chosen, to state an account so that the amount of the profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown." I would invite attention to the very strong phrase 'random assessment.' Lord Mackenzie said in the same case, "With regard to the Solicitor-General's observations upon the practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say this that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not a matter with which the Courts are concerned. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be, whether they can be done in a satisfactory manner or not."

9. The third point in the petitioners' original petition runs as follows:—

(iii) Whether a finding that "it is doubtful whether the accounts seen by the Inspector were genuine" is a finding entitling the Income-tax Officer to compute upon an arbitrary basis under section 13.

In view of what I have said in the previous paragraphs it seems unnecessary to labour this point. The assessee in their petition have picked out a few words forming part only of a sentence in the assessment order, and refer to this as a finding. I would also point out that the use of the word 'arbitrary' in the petition in connection with section 13 is not justified by the provisions of that section. The word 'arbitrary' appears nowhere in section 13 of the Act. I confine myself therefore to drawing your Lordships' attention to the fact, already referred to in a previous paragraph, that when the Income-tax Officer forms the opinion that the income cannot be deduced from the accounts, the law requires him to compute the income upon such other basis and in such other manner as he may determine.

10. The above three points are raised by the petitioners in regard to their mercantile business. The original petition then goes on to consider the mineral water factory and alleges that in respect to this business six questions of law arise. The first three are the same as in the case of mercantile business, and it is unnecessary for me to reconsider them at this stage, as the accounts examined and found incorrect and incomplete by this department were those of all branches of the business. The next point therefore to be con-

(1) 6 Tax Cas. 113.

sidered is that numbered (iv) under the heading mineral water factory. This runs to the following effect:—

(iv) Where an assessee gives evidence that a certain manufactured product is sold by him as necessary part of a composite article and that the profit on such product is contained in the profit on such composite article, whether the Income-tax Officer is entitled to assess a separate sale and a separate profit in respect of such product in addition to assessing a full profit on the sale of the composite article of which it forms part.

The context shows that this question is raised in connection with two separate articles—(a) Syrups, and (b) Ice. In the petition now under consideration it is alleged in regard to syrups that “though large quantities of syrups are manufactured these are mainly used as flavouring for the coloured waters, one ounce a bottle, and the cost of the syrups is recovered by the much larger price assigned to flavoured waters as compared with plain soda water.” It is also stated that a small quantity of syrups is sold in bottles. I submit that it is not necessary for me to consider further the question of syrups sold as component parts of the flavoured waters, as this point is raised for the first time in the petition now under consideration and not in the original appeal. In the appeal the question of syrups was raised only on the allegation that syrups are only sold by the bottle, and that in small quantity only. I have therefore to consider the present question of law as stated by the petitioner in respect of the sale of (b) Ice. In the petition now under consideration it is stated “Ice is not sold at all and is only bought for cooling the stock.” In the original appeal submitted to the Assistant Commissioner, however, the wording is as follows:—“For instance, the petitioners do not carry on any business in ice, they simply buy and use ice for cooling drinks and the charges are only nominal.” These two allegations of the petitioners are clearly inconsistent. In one place they state that ice is not sold at all and is only bought for cooling the stock, whereas in the other case they state that ice is only used for cooling drinks and the charges are only nominal. It was on the question of ice sold in drinks that my predecessor remanded the case for further enquiry and the enquiries showed that ice was purchased in order to be used in cold drinks in the hot weather, and that an additional charge of one pice per glass is made by the assesseees on account of the extra cost of the ice. The assesseees having once admitted that they make an extra charge however nominal when ice is placed in a glass of mineral waters sold, it seems to me that the department is on very safe ground in estimating the charge for ice so used at one pice per glass, it being impossible to the assesseees in retailing mineral water by the glass to make a lower charge per glass than one pice. I have stated the facts in regard to this question of ice in view of the fact that it is referred to in the order of the Hon’ble Judges of the Division Bench in response to which the present reference is being made, but I cannot find any actual question of law wrapped up in the elaborate wording of the petitioners’ point No. (iv). Both the petitioners and the department agree that in the hot weather a small portion of ice is placed in the glasses of aerated waters retailed. The petitioners state that for this they make a nominal charge only. The department has assumed this nominal charge to be the smallest coin in common daily use in the country and by calculating the market price of ice per maund and allowing a sufficient margin for wastage has calculated the profits on ice thus retailed in cold drinks as amounting to Rs. 1-11-0 per maund or Rs. 720 per annum. The fact whether profits on ice, thus admittedly included in the cold drinks retailed, amount in a year to Rs. 720 is one, I submit, for this department to determine.

11. The next point raised by the petitioner is as follows:—

(v) Whether an Income-tax Officer is entitled to assess a profit on an article in which the assessee states that he does not deal without evidence that he does so deal.

In regard to this point the only deduction possible from the context is that this refers to the sale of ice, and it would appear that the assessee is under the impression that this department has assumed an income accruing to him from the sale of ice as such. It is sufficient for me to note here that the assessment on the petitioner does not include any amount assumed as profits from ice sold as such. The question of ice included in cold drinks retailed has been dealt with in the previous paragraph.

12. The next point raised by the assessee is as follows:—

(vi) Whether a business not carried on by an assessee and not the subject of any return by him becomes a business carried on by him within the intent of section 10 (1) of the Act on a mere finding by the Income-tax Officer not based on any evidence and without specifically calling upon the assessee to produce evidence upon the point under section 23 (3) of the Act.

I confess that I am unable to extract any sense whatever out of the above so-called question of law. As far as I can make out this "point" is the result of the petitioners' erroneous idea that the Income-tax Officer has assumed an income from the sale of ice as such. The department, as I have shown above has not assessed the petitioners on the business of sale of ice, and therefore the point as framed, so far as it is intelligible at all, would appear to have no bearing whatever on the assessment under consideration.

13. The third source of income referred to in the petition is house property, and the petitioners claim that in respect to this property two further questions of law arise, viz. :—

(vii) When an Income-tax Officer considers himself justified in assessing a business of the assessee arbitrarily under section 13 of the Act, whether he is therefore justified in assessing the income from buildings and land of the assessee arbitrarily and if so whether there should not be specifically, (a) a finding, and (b) evidence to show that the return in respect of property is incorrect.

I would again draw your Lordships' attention to the unwarrantable coupling of the word 'arbitrarily' with section 13 of the Act. It is difficult for me to give a simple answer to a question in which the terms 'arbitrary assessment' and 'assessment under section 13' are assumed to be practically synonymous terms. Stripped of irrelevant assumptions of fact the question now under consideration would appear to be as follows:—"Whether, when an Income-tax Officer finds it necessary to compute the income of an assessee's business under the proviso to section 13 of the Act, the Officer is entitled to compute the assessable income from property upon some basis other than the return submitted by the assessee." In this connection I would draw your Lordships' attention to the fact that the petitioners appear to be under a misapprehension in assuming that their income from property has been computed in accordance with section 13. The assessment order does not mention this section, and the section itself shows that it applies only to the income, profits and gains from the heads of income specified in sections 10, 11 and 12. The assessable income under the head 'property' is set forth in section 9 of the Act to which section 13 does not apply. Section 9 of the Act prescribes that tax shall be paid in respect of the *bona fide* annual value of property consisting of any building or lands appurtenant thereto of which the assessee is the owner, and specifies

precisely how the assessable income from such property is to be computed. That is to say the *bona fide* annual value of the property has to be discovered, and the allowances specified in the section deducted therefrom.

In this connection I would draw your Lordships' attention to the fact that the assessee failed to furnish this department with a return of the "*bona fide* annual value" of their house property. They returned the form issued to them under section 22 (2) blank but accompanied by a profit and loss account on a separate paper. The details to be filled in on page 3 of the form to enable the "*bona fide* annual value" of their house property to be determined were left blank. In their profit and loss account the assessee showed actual cash receipts from "House rent" as Rs. 2,058-12-6.

I submit, therefore, that the answer to the assessee's so-called question of law, so far as it can be answered at all, is as follows:—"As the assessee failed to submit a return of the *bona fide* annual value of their house property, a legal obligation rested on the Income-tax Officer to compute the said '*bona fide* annual value' on such materials as were available to him, including the assessee's statement of the actual cash receipts from house rent."

14. Before leaving this point I would desire to lay before your Lordships, as establishing the *bona fides* of the proceedings of this department the actual method on which the *bona fide* annual value of the assessee's house property has been computed. This has been computed as follows:—

	RS.	A.	P.
1. Actual cash receipts from house rent during the year ended 31st March, 1923 as declared by the assessee			
2. A sum shown in the assessee's accounts as due for rent from one Lala Ganpat Rai during 1922-23, but not actually received during the year	2,058	12	6
3. Estimated annual value of the portion of the house property occupied by the assessee and their family. (N. B.—The front portion of the second storey above the shop is let for Rs. 1,440 per annum, and the assessee and their family occupy the back portion of the same storey)	480	0	0
	600	0	0
Total	3,138	12	6
Omitted to round off the figures	138	12	6
Gross <i>bona fide</i> annual value assumed	3,000	0	0
Allowances for repairs under section 9 (i)	500	0	0
Nett <i>bona fide</i> annual value assessed	2,500	0	0

15. The final 'question of law' raised by the assessee is

(viii) Whether having regard to the provision of section 13 of the Act 'property' as defined in section 9 of the Act can, under any circumstances, except those contemplated by section 23 (4) of the Act, be arbitrarily assessed by the Income-tax Officer?"

Stated simply the above question would appear to be "Does section 13 of the Income-tax Act apply to the computation of the *bona fide* annual value of property assessable under section 9?"

Seeing that section 13 refers categorically only to sections 10, 11 and 12 of the Act, the answer to the question as I have stated it is clearly "No". But

as I have shown in the next foregoing paragraph that section 13 has not been utilised in the present case in computing the *bona fide* annual value of the assessee's house property, I am unable to see how this question arises in the present case at all.

16. In conclusion, I must express my regret to your Lordships' for the inordinate length of the present reference. In this, however, I have had no option. The unnecessary complexity of the assessee's original petition under section 66 (3), has combined to render it necessary for me to go into every point raised in both petitions.

C. H. Oertal, for the assesseees.

Des Raj Sawhney, Public Prosecutor, for the Government Advocate, for the Crown.

JUDGMENT.

The petitioners manufacture and sell aerated waters and carry on a grocery business. They furnished a return of their income for the year 1922-23 and produced their accounts. The Income-tax Officer in an order of the 20th October, 1923, said that no regular accounts were produced and that it was doubtful whether those seen by the Inspector were genuine, and remarking that the business was prosperous and profitable he proceeded to give an estimate, not based on any evidence, of the sales and profits, as well as of the income derived from the rent of the petitioners' house property considerably in excess of the figures stated in the petitioners' return; he assessed the total income at Rs. 22,000. On appeal the Assistant Commissioner allowed an additional Rs. 2,000 for the costs of the petitioners' establishment, but otherwise upheld the order of the Income-tax Officer. The petitioners then applied to the Commissioner to refer certain questions of law to this Court. The application was rejected, but this Court on being moved by the assesseees under section 66 (3) of the Income-tax Act, directed the Commissioner to state the case, and a reference has now been made by him in accordance with that direction.

The learned Commissioner has dealt at considerable length with the various points—eight in number—mentioned by the petitioners in their application to him. We think it is unnecessary to enumerate them or to discuss them in detail. The only real question for decision is whether after the petitioners had furnished a return of their income and had produced their accounts in compliance with a notice under section 22 (4) of the Act, the Income-tax Officer, when not satisfied that the accounts were correct, was justified in computing the income in such a manner as he thought fit. In support of the Income-tax Officer's order the learned Commissioner relies upon the proviso to section 13, but that proviso applies only when no method of accounting has been regularly employed or when the method employed is such that in the opinion of the Income-tax Officer the income, profits, and gains cannot properly be deduced therefrom. The Income-tax Officer in his order assessing the petitioners said nothing about the method of accounting employed by them, but expressed a doubt, for which he gave no reasons, as to the genuineness of their accounts. Section 13 therefore has no application at all, but the section applicable is section 23 (2) which requires the Income-tax Officer, if he has reason to believe that the return made is incorrect or incomplete, to serve on the person who made the return a notice requiring him, on a date to be therein specified, either to attend at the Income-tax Officer's Office or to produce or to cause to be produced any evidence on which such person may rely in support.

of the return. In this case the Income-tax Officer did not serve such a notice on the petitioners, not does he appear to have pointed out to them any defects or irregularities in the accounts, so that they might be able to explain them, but he made a purely arbitrary assessment without having given them an opportunity of supporting the return which they had furnished.

Such an assessment was in our opinion illegal and we answer the question of law above stated in the negative and direct that the petitioners be paid their costs by the Crown. Counsel's fees, Rs. 150.

[160] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Mr. Justice Cuming and Mr. Justice Page.

[11th February, 1926.]

Commissioner of Income-tax, Bengal ... Referring Officer.

v.

Indu Bhusan Sankar ... Assessee.*

Income-tax Act (XI of 1922), Secs. 4 and 6—Income from Jalkars in permanent settled estates—Jalkar income included in assets of estate—Exemption from assessment to income-tax.—Permanent Settlement Regulation, 1 of 1793.

The income of the assessee from jalkars which were included in the assets upon which the jama of his estates were assessed under Regulation 1 of 1793 at the time of the Permanent Settlement, is not liable to assessment to income-tax under the Income-tax Act, XI of 1922.

Commissioner of Income-tax v. Zamindar of Singampatti, (1) I T C 181 and *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax* 1 I T C 303, Followed.

Case [Reference No. 5 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

CASE.

At the request of the assessee I have the honour to submit herewith under section 66 (2) of Income-tax Act the following questions of law for the decision of the Hon'ble High Court:—

"Is the income from the Jalkars, which were included in the assets upon which the jamas of the Estates TNS 106 and 107 of the Dacca Collectorate and TN 6301 of the Faridpur Collectorate were assessed under Regulation I of 1793 at the time of the Permanent Settlement, liable to assessment to income-tax under Act XI of 1922."

2. The facts are as follows:—Babu Indu Bhusan Sarkar an assessee of Faridpur district declared in his return filed under section 22 (2) of the Income-tax Act an income of Rs. 6,574 from Jalkars and was assessed under section 23 (3) on this and other sources of income. He appealed against the assessment to the Assistant Commissioner of Income-tax, Faridpur, on the ground that this income from jalkars arose from assets which were included in the assets taken into consideration in settling the jama of the three Estates TNS 106 and 107 of the Dacca Collectorate and TN 6301 of the Faridpur Collectorate at the time of the Permanent Settlement under Regulation I of 1793 and that any further imposition on the same source in the shape of Income-tax would be contrary to Article VI of the said Regulation. There was no claim that income from Jalkar was agricultural income as defined in section 2 (1) of the Income-tax Act (XI of 1922) and exempt as such under section 4 (3) (viii) of the same Act. The assessee supported his claim by a reference

* (1926) I L R 53 Cal. 524; 30 C W N 524; A I R (1926) Cal. 819.

to the decision of Dawson Miller, J., in the case of *Maharaja of Darbhanga v. Commissioner of Income-tax, Bihar and Orissa* (1). The Assistant Commissioner rejected the appeal relying on the judgment of Rankin, J., in the case of *Emperor v. Probhat Chandra Barua* (2).

3. The assessee has now applied for a reference of this question of law to the Hon'ble High Court under section 66 (2), Income-tax Act (XI of 1922). I have ascertained from the Collectors of Dacca and Faridpur that the income from the Jalkars was included in the assets upon which the jamas of the said Estates were fixed under Regulation I of 1793. Accordingly I refer the question as stated at the commencement of this letter.

4. Under section 66 (2) I am required to express my opinion on the question which is referred and I would answer the question in the affirmative, adopting the reasons given by Rankin, J., in his judgment in the case *Emperor v. Probhat Chandra Barua* (2).

5. In that judgment of Rankin, J., the remark was made that the High Court was without any assistance in regard to the practice of the Revenue Authorities since 1886 as regards fisheries in permanently settled estates. A reference to the previous assessment record of this assessee shows that he has for years declared and has been assessed on income from fisheries: and so far as my personal experience goes (and the enquiries I have made uniformly confirm my experience) income from fisheries has all along been assessed to income-tax in Bengal without objection. The claim now made that income from fisheries and from similar items of non-agricultural income in permanently settled estates are exempt from income-tax is a new one which, so far as I can discover, has only been raised in the last two or three years and whatever the legal position may be (and the judgment of Rankin, J. appears to me to be conclusive on the subject) there can be no doubt that the general practice all along has been to assess income from such sources to income tax—*vide* Rulings 9, 10, 12 of the Bengal Board of Revenue in Appendix IV, page 75, Bengal Income-tax Manual, 1907, which were given in 1886 and have been followed uniformly ever since in Bengal. I attach copies of the rulings for ready reference.

Rupendra Kumar and Dharma Das Sett, for the assessee.

B. L. Mitter, Surendra Nath Guha and Satindra Nath Mukerji, for the Crown.

JUDGMENT.

CUMING, J.—This is a reference under section 66 (2) of the Income-tax Act by the Commissioner of Income-tax, and the question of law referred for decision is:—Is the income from the Jalkars, which were included in the assets upon which the jamas of the Estate Touzi Nos. 106 and 107, Dacca Collectorate and Touzi No. 6301 of the Faridpur Collectorate were assessed under Regulation I of 1793 at the time of the Permanent Settlement, liable to assessment to income-tax under Act XI of 1922. I am of opinion that the answer must be in the negative. The sections of the Income-tax Act on which the Commissioner relies are:—

Section 4 which provides that save as hereinafter provided this Act shall apply to all incomes, profits or gains as described or comprised in section 6 from whatever source derived, accruing, or arising or received in British India, or deemed under the provisions of this Act to accrue or arise or be received in British India.

Section 6 provides "Save as otherwise provided by the Act, the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, namely, (i) Salaries, (ii) Interest on securities, (iii) Property, (iv) Business, (v) Professional earnings, (vi) Other sources."

The contention of the Commissioner of Income-tax is that the profits from fisheries fall under "other sources" and that there is nothing in the Act which exempts such profits from the operation of the Act.

The assessee relies on Regulation I of 1793 (The Bengal Permanent Settlement Regulation) with special reference to Articles III, IV, VI.

He argues that by this Regulation the amount of revenue payable by his Estate is fixed in perpetuity; that the income from these fisheries was taken into account in assessing the amount of revenue to be paid, and hence he is paying revenue for these fisheries, and that now to assess these fisheries to income-tax is in reality to increase the amount of revenue payable by him.

He does not contend that the Legislature has not the power to do so, but he argues that the Act which takes away a right conferred on the subject by a previous enactment must do so in clear and unequivocal language.

The Commissioner of Income-tax contends that the language of the Income-tax Act is sufficiently clear, and that by the words "other sources" so much of Regulation I of 1793 as covers the income derived from fisheries is repealed.

To discover what is the rule which should guide the Courts in determining whether the provisions of one Act are repealed or modified by a subsequent enactment, it will be sufficient if I refer to the observations of three very learned Judges.

Lord Selbourne, Lord Chancellor, in the case of *Mary Seward v. The Owners of the Vera Cruz* (1) remarks:—"If anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from, merely by force of such general words without any indication of a particular intention"

Let us apply the rule to the present case.

We have in the Regulation of 1793 an Act which deals specially with the fixing of the revenue to be paid by permanently settled estates. The words used in the Income-tax Act are very general, viz., "other sources." The provision is obviously capable of a reasonable and sensible application without extending it to incomes derived from fisheries. They are obviously not the only income which might fall under other sources.

There is, to my mind, nothing in the words "other sources" to indicate that by these words the Legislature had the particular intention of repealing so much of Regulation I of 1793 as dealt with the fixity of revenue so far as fisheries were concerned.

Lord Justice Bowen re-stated the same rule in the case *Re Cuno, Mansfield v. Mansfield* (2). In the case of *Garnet v. Bradly* (3) Lord Blackburn remarked; "But where there is the case, where the particular enactment is particular in the sense that it protects the right, the property, the privileges of particular person or a class of persons the reason for the rule which has been acted upon is exceedingly plain and strong. It would be very unjust or I would rather say unfair (I do not go further than that) to pass an enactment

(1) (1884) 10 App. Cas. 59 at p. 68.

2. (1889) 43 Ch. D 12 at p. 17

3. (1878) 3 App. Cas. 944 at p. 967.

taking away from a particular person or class of persons his or their rights without hearing what he or they got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class, which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it and it is not to be imputed to the Legislature or to be supposed that the Legislature would do what was unfair." Let us apply these observations also to the present case.

Regulation I of 1793 does certainly confer certain rights and privileges on a particular class of persons with whom these estates were settled at the time of the Permanent Settlement, enacting that the revenue which they should pay for their estates then settled with them was fixed for ever. If these rights are to be taken away by the general words "other sources of income", clearly their rights would be taken away without their having any knowledge or opportunity of resisting it.

As Lord Blackburn puts it, it is an intelligible principle that the Legislature shall not be presumed to have done anything unfair and to have taken away a privilege not having openly stated that they meant to take it away or in such open or clear language that the persons affected might come and resist and use arguments to show why it should not be taken away but having simply used general words quite consistent with their never having thought of the privilege at all.

It must be remembered that the Income-tax Act was passed by the Central Assembly. There are many parts of India where the Permanent Settlement and all that it implies are entirely unknown, and there is nothing to show that the Legislature when enacting the particular Act had in mind the Permanent Settlement and deliberately took away one of the privileges conferred by the Regulation. As Lord Blackburn puts it, the general words are quite consistent with the Legislature having never thought of the Permanent Settlement at all. It is difficult for me to think that the Legislature would by an indirect route alter the important and long cherished privileges conferred by the Permanent Settlement.

I am not in any way impressed by the argument of the Commissioner of Income-tax that hitherto incomes from fisheries have been assessed to income-tax without objection. It may have been but that does not make it any more legal. Neither is there anything to show that the incomes of these fisheries he referred to were taken into account in fixing what revenue had to be paid.

The view which I now take is the view which has commended itself to the Madras High Court [see *Chief Commissioner of Income-tax v. Zemindar of Singampatti* (1)] and also to the Patna High Court [see *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax* (2)]. The answer I would give to the reference of the Commissioner of Income-tax is that the incomes of such Jalkars as are referred to in his letter of reference are not liable to be assessed to income-tax.

PAGE, J.—I agree. In the case of *Emperor v. Probhat Chandra Barua* (3) I had occasion to state my views on this matter and I need not repeat them. In that case I had the misfortune to differ from my brother Rankin, J., but before that case was decided the Madras High Court in *Chief Commissioner of Income-tax v. Zemindar of Singampatti* (1) and since it was decided, the Patna High Court in *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax* (2) and after remand (4) arrived at the same conclusion as that which I expressed in *Emperor v. Probhat Chandra Barua* (3). It is highly important

that questions affecting the liability of the subject to taxation should not remain in doubt, and notwithstanding the dissentient views of Rankin and Mullick, JJ., it is satisfactory that a Full Bench of the Madras High Court, and a Division Bench of the High Court at Calcutta and Patna which have been invited to express an opinion on this important matter have each now answered the question propounded in the same sense, and are of opinion that income derived from sources such as that which is the subject-matter of this reference is not assessable to income-tax.

[161] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Crump.

[6th April, 1926.]

Ratanchand Khimchand Motishaw Assessee*
v.

The Commissioner of Income-tax, Bombay.

Income-tax Act (XI of 1922), Secs. 33 and 66 (2) and (3)—Commissioner's review order under Sec. 33—Requisition on Commissioner to state a case thereon, if lies—Limitation for application to state a case—Jurisdiction to extend time therefor.

On an application by the assessee, dissatisfied with the order made by the Commissioner acting in review under Sec. 33 of the Income-tax Act, for an order requiring the Commissioner of Income-tax to state a case for the opinion of the High Court.

Held, (1) that the High Court has no power to extend the month's time prescribed under Sec. 66 (2) of the Act for a requisition on the Commissioner to state a case; and

(2) that a power of requisition on the Commissioner in respect of his orders in review under Sec. 33 of the Act not having been provided for by the Legislature, the application cannot be entertained.

Application for the issue of an order requiring the Commissioner of Income-tax, Bombay to state a case for the opinion of the High Court.

D. A. Tulzapurkar, for the assessee.

Kanga, Advocate-General, with the Government Solicitor, for the Crown

JUDGMENT.

MACLEOD, C. J.—An order was made by the Assistant Commissioner of Income-tax in this case on May 13, 1924, in the matter of the appeals against income-tax and super-tax assessments, levied against R. K. Motishaw and Co., by the Senior Income-tax Officer for the year 1923-24. Under section 66(2) of the Indian Income-tax Act, (XI of 1922) the assessee, within one month of the passing of an order under section 31 against him, may require the Commissioner to refer to the High Court any question of law arising out of such order and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court. The assessee, therefore, had time till June, 13, 1924, to require the Commissioner to state a case. No such requisition was made on the Commissioner, but it appears that an application was made to the Commissioner to revise the order of the Assistant Commissioner.

On July, 3, 1924, the Commissioner passed an order that, on perusal of the record and proceedings, he declined to interfere. Further correspondence ensued, and on July, 30, the assessee requested the Commissioner to make reference to the High Court under section 66. The Commissioner agreed to hear the assessee and on August 16, he passed another order under section 33 in effect taxing the assessee on an income of Rs. 20,000. The assessee was not

*(1926) 28 Bom L R 1096; A I R (1926) Bom. 566; 98 Ind. Cas. 299.

satisfied, and again asked the Commissioner to state a case for the opinion of the High Court on the second question on which he asked for a reference. The Commissioner refused, so that the assessee made an application to this Court under section 66 (3). But the period for limitation for a requisition on the Commissioner to state a case being clearly one month under sub-section (2), we have no power to extend the time. A suggestion that, when the Commissioner has made an order in review under section 33, the assessee, if dissatisfied with the order, may require the Commissioner to state a case, cannot be sustained. Such a power of requisition on the Commissioner to state a case is not provided for by the Legislature, and consequently we cannot entertain it. In fact, the assessee is out of time, and he is no longer entitled to come to this Court and ask for an order requiring the Commissioner to state a case for the opinion of the High Court.

The petition will be discharged with costs throughout. As regards the summons counsel certified. Costs to be awarded on the Original Side scale.

[162] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Broadway and Mr. Justice Fforde.

[18th March, 1926.]

Messrs. Daya Ram Sobha Ram

...

Assessee.

v.

The Commissioner of Income-tax, Punjab ...

Respondent.

Income-tax Act (XI of 1922), Secs. 13 and 66 (2)—Assessee keeping complicated accounts—Profits not ascertainable therefrom—Assessment at a flat rate on turn over—Fixing the rate, if a question of law.

The assessee whose accounts were kept in such a complicated manner that it was not possible to prepare a profit and loss statement therefrom, was assessed by the Income-tax Officer at a flat rate of 10 per cent. on the turn over of the business. The assessee objected to the rate on the ground that the Income-tax Department assessed other people doing the same business as assessee's at a flat rate of 6½ per cent. only and applied to the High Court under Sec. 66 (2) of the Income-tax Act for an order requiring the Commissioner to state a case thereon to the High Court.

Held, that, in the absence of clearly and properly kept accounts the charging of a flat rate being only one mode of arriving at the assessment under Sec. 13 of the Act, there was no question of law for stating a case.

Petition [Case No. 618 of 1925] under section 66 (2) of the Income-tax Act, XI of 1922, praying that the Income-tax Commissioner may be directed to refer certain questions of law to this Court for decision.

Jagan Nath Aggarwal, for the assessee.

The Government Advocate, for the Crown.

JUDGMENT.

BROADWAY J.,:—This is an application under section 66 (2) of the Income-tax Act, XI of 1922, in which it is asked by the petitioner that orders should be issued to the Income-tax Commissioner directing him to refer certain questions of law to this Court. It appears that the firm of Messrs. Daya Ram Sobha Ram, who carry on business in Amritsar, have been assessed to pay a certain sum as income-tax, the assessment being based on a turn over of Rs. 1,36,587. The assessment was made under section 13 of the Income-tax Act and was arrived at by applying a flat rate of 10 per cent. In the course of making his assessment the Income-tax Officer referred to the petitioner having gone to Japan and there made certain purchases of silk immediately after the earthquake there. The petitioner alleged that no visit had been paid to

Japan and that the Income-tax Officer was wrong in thinking that he had been there. At the same time it was admitted that visits had been paid to Bangkok and Shanghai. The Assistant Commissioner while maintaining the flat rate of 10 per cent. reduced the amount on which the tax was to be assessed by the amount said to have been expended on the journeys to the East. In the application to the Income-tax Commissioner made under section 66 (2) of the Act it was said that it was illegal for the Income-tax Department to raise arbitrarily in the petitioner's case the flat rate of $6\frac{1}{4}$ per cent. accepted and admitted by the Department itself as the basis for the purpose of assessment in the case of all wholesale dealers of silk in Amritsar. The Income-tax Commissioner refused to refer this question as he did not consider it to be a question of law. In the application now made before us the same prayer is made. Mr. Jagan Nath Aggarwal who appeared for the petitioner was unable to point out to us any question of law that arises in this matter. All that he could say was that it was illegal for the Income-tax Department to charge a flat rate of 10 per cent. instead of $6\frac{1}{4}$ per cent. No serious objection has been, or could be, in this case, taken to the assessment being arrived at under section 13 by means of fixing a flat rate. So the question sought to be referred is whether the Income-tax Department were entitled to charge a flat rate of 10 per cent., in the petitioner's case when in other cases they had charged $6\frac{1}{4}$ per cent. To my mind this is not a question of law. The charging of a flat rate is only one mode of arriving at the assessment in the absence of clearly and properly kept accounts and in this case Mr. Jagan Nath had to admit that the accounts were so complicated that their auditor was unable to prepare a profit and loss account from them. Mr. Jagan Nath does not urge that the mode of arriving at the assessment by means of a flat rate is illegal but objects only to the amount at which that rate has been fixed. In my opinion there is no question of law which we could possibly direct the Income-tax Commissioner to refer and I would therefore dismiss the application with costs.

FFORDE, J :—I agree.

[163] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Crump.
[9th April, 1926.]

The Western India Turf Club, Ltd., Assesseees *

v.
The Commissioner of Income-tax, Bombay Referring Officer.
Income-tax Act (XI of 1922), Secs. 26 & 55—Finance Act, 1925, Sch. III Part II
—Super-tax—Conversion of Turf Club into limited company—Assessment on income of
previous year before conversion—Rate of super-tax applicable—Scale rate or company
flat rate—Effect of conversion.

The Western India Turf Club, Limited, which was registered under the Companies Act as a limited company on the 1st April, 1925 by the conversion of the Western India Turf Club into a company limited by guarantee, was assessed to super-tax for the financial year 1925-26 under Secs. 26 & 55 of the Income-tax Act on the income of the Club for the previous year 1924-25 and super-tax was levied thereon at the scale rates of one to six annas leviable under Sch. III, Part II (b) of the Finance Act, 1925, at which rates the Club was in the past assessed to super-tax. The assessee contended that the rate of super-tax leviable was the flat rate of one anna applicable to a company under Sch. III, Part II (1) of the Finance Act.

On a reference to the High Court,

* (1926) I L R 50 Bom. 640; A I R (1926) Bom. 539; 28 Bom. L R 1236; 98 Ind. Cas. 226.

Held, that the assessee was liable to be assessed to super-tax as a company at the flat rate of one anna in the rupee in respect of the excess over fifty thousand rupees of the total income of the Turf Club for the previous year.

Begg Sutherland and Co., Ltd. v. Commissioner of Income-tax, 2 I T C 30, Explained and distinguished.

Case [Civil Reference No. 6 of 1926] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Bombay, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, India (hereinafter called the Act), and at the instance of the Western India Turf Club Limited, Bombay (hereinafter called the club), I have the honour to submit for your Lordships' opinion certain questions of law respecting the interpretation of section 26 read with sections 58 and 55 of the Act arising in the case of the above Club which was converted into a Limited Company from the 1st April, 1925. The questions to be decided are categorically set out in para. 3 below. They arise out of the super-tax assessment of the above Club for the current financial year, viz., 1925-26 ending on the 31st March next.

2. FACTS OF THE CASE: The Western India Turf Club was, in the past, being assessed to super-tax on its total income at the scale rates of 1 to 6 annas in the rupee as an unregistered firm. From 1st April, 1925, it converted itself into a Limited Company by being registered under the Indian Companies Act, VII of 1913, India, as a company limited by guarantee. The object of the Company thus formed was *inter alia* to take over the assets, effects and liabilities of the unincorporated Club previously known as the Western India Turf Club and to continue its activities. Thus from the above date, viz., 1st April last, the Club became a Limited Company. For the current financial year 1925-26, it was called upon under section 22 (1) read with section 26 of the Act to put in a return of income for the previous year, viz., 1924-25. It accordingly put in its return of income showing the income earned by the Club as an unregistered firm during the previous year 1924-25 when the Company was not in existence. For the purposes of assessment, the Senior Income-tax Officer determined the total income to be Rs. 15,03,522 under section 23 (1) of the Act and calculated super-tax thereon at Rs. 4,59,153 by applying to it the scale rates applicable to an unregistered firm: These rates vary from 1 to 6 annas per rupee, being 1 anna for the first Rs. 50,000 of income after allowing the statutory deduction of Rs. 50,000, 1½ anna for the second Rs. 50,000, 2 annas for the third Rs. 50,000 and so on up to 6 annas. The Club contended that as it was converted into a Limited Company from the 1st April 1925, the rate of super-tax applicable to it was that prescribed for a company, viz., the flat rate of one anna per rupee on the balance of the above income after deducting Rs. 50,000. The amount of super-tax payable at this flat rate came to Rs. 90,845-2-0 and the Club argued that it was liable to pay this much amount only. It was, however, decided to levy super-tax at the scale rates of 1 to 6 annas, following the decision of the Allahabad High Court in its Miscellaneous Case No. 123 of 1925, *In the matter of Messrs. Begg Sutherland & Co., Ltd. of Cawnpore* (1), in which case the Hon'ble Court held that when a firm was converted into a limited company, the profits made by it as a firm prior to its conversion into a company, were to be assessed as the profits of a firm but that the company was to be called upon to pay the amount of the tax thus calculated. In the present case, the profits to be assessed were those made by the Club as

a firm in the year 1924-25 when it was not a limited company. These profits became liable to tax in 1925-26 when the firm has ceased to exist. It was succeeded by the limited company which became liable under section 26 of the Act. As stated above, the Allahabad High Court having already interpreted this section 26 as laying down that the company was to pay what the firm was chargeable with, the same principle was followed in levying the super-tax assessment in this case. The Club not being satisfied with this decision has called for a reference to your Lordships in the matter. The rates of super-tax applicable to unregistered firms, companies, etc., are prescribed in Part. II of Schedule III to the Indian Finance Act, 1925 (XIII of 1925, India).

3. **QUESTIONS ON WHICH THE OPINION OF THE HIGH COURT IS REQUIRED:**—The questions of law on which the opinion of your Lordships is required under section 66 (2) are as under.—

(1) When an unregistered firm converts itself into a limited company, while assessing the latter under section 26 read with section 58 on the income earned by the unregistered firm prior to the conversion, is super-tax to be levied at the scale rates of 1 to 6 annas applicable to the income of unregistered firms, or at the flat rate of 1 anna applicable to the income of a company?

(2) Is section 26 of the Act to be regarded as requiring that the income earned by the unregistered firm be treated as the income of a company and taxed at the flat rate of one anna, or the section be taken as merely requiring the company to step into the shoes of the defunct firm for the sole purpose of payment of the super-tax due from it as an unregistered firm?

(3) Whether the assessment to super-tax levied on the Club for the year 1925-26 at scale rates between one anna and six annas is in order; and

(4) Whether the Club as a limited company should not be assessed to super-tax for the above year at the flat rate of 1 anna in the rupee.

4. **OPINION OF THE COMMISSIONER.** As section 66 (2) requires that I should give my opinion of the case while forwarding the reference, I beg to submit the same in the following paragraphs.

5. Up to 1st April, 1925, the Club was being assessed at the scale rates of 1 to 6 annas as an unregistered firm and it used to pay super-tax thus levied without any dispute. From 1st April 1925, it converted itself into a Company. The profits to be assessed for the current year 1925-26 were those made by the Club in 1924-25 as an unregistered firm which ceased to exist from 1st April 1925. When the time for the super-tax assessment for 1925-26 came, as an unregistered firm was not in existence, under section 26 read with section 58 of the Act, the assessment proceedings were started against the limited company. The income to be taxed was ascertained at Rs. 15,03,522 and it was to be assessed to super-tax. It was earned not by the company but by the firm which preceded it. A case of this kind is, as stated above, governed by sections 26 and 58 to which we have to turn. Section 58 merely makes section 26 applicable to super-tax assessment too and so we have to confine our attention to the latter section only. It runs as under.—

Change in ownership of business.

“S. 26.—Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted or on the person engaged in the business, profession or vocation as the case may be, at the time of making of the assessment.”

The section is unfortunately not quite clear as regards the point in dispute. It merely states that where a person [which term includes a company too under the provisions of section 3 (39) of the General Clauses Act (X of 1897, India)] succeeds to any business, *the assessment* is to be made on the person engaged in it at the time of the making of the assessment. By the words 'the assessment' in this section is meant 'the assessment' referred to in section 23 of the Act. Turning to that section it appears that therein the term 'assessment' is not defined, nor is it defined anywhere else in the Act. In the margin of section 23, the word 'assessment' is put in to indicate that the section deals with assessments. In sub-section (1) of section 23, the words "he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of such return" appear. In sub-section (3) of this section, we find the words "the Income-tax officer . . . shall, by an order in writing, assess the total income of the assessee and determine the sum payable by him on the basis of such assessment." From this, one might infer that by the words 'the assessment' is meant the process of ascertaining the total income of an assessee and determining the amount of tax payable on its account. Hence, when a person succeeds another in business, section 26 can be taken to empower the Income-tax Officer to ascertain the total income for the previous year and determine the amount of tax payable thereon as if the person who succeeded to the business was identical with the person whom he succeeded. The intention appears merely to substitute for assessment purposes the person carrying on the business at the time of the assessment in place of the person who carried on the business in the previous year and earned the profits to be taxed and in all other respects to allow the assessment to be made as if there was no change of ownership. The rate or rates of tax and the amount of income all remain the same; only in place of the old owner being required to pay the tax, the person carrying on the business at the time of the assessment is made liable by this section 26. This is the view taken by the Allahabad High Court in, *In the matter of Begg Sutherland & Co., Ltd.* (1) referred to above and any other view would lead only to the most anomalous results as shown below. The Legislature could never have intended that in cases where such conversions take place, the profits made should escape the full amount of tax due or should pay more than that amount. All that must have been intended was to secure that the tax due be paid as if no change had taken place in the proprietorship of the business. Taking for instance, the above case of *In the matter of Begg Sutherland & Co. Ltd.*, (1) that was a registered firm at first. It was converted into a limited company. Under the Act, a registered firm is exempt from super-tax and its partners are made liable on their shares in the profits at the scale rates of one to six annas. If there had been no conversion of this firm into a company, the partners alone would have paid super-tax. If section 26 be interpreted as merely requiring the company to pay the assessment that would have been payable by the registered firm as if no conversion had taken place, then too only the partners would pay super-tax and no one else. If, however, section 26 be taken to mean something more and requiring that the tax be levied at rates applicable not to the firm which made the profits but to the company which succeeded it, an additional super-tax would be payable by the company. Thus the partners of the registered firm would pay super-tax and at the same time the company would pay super-tax. Hence, as a result of the conversion, the profits which had been already made liable to super-tax at the full scale rates of one to six annas in the hands of the partners would

again be made liable to super-tax as being those of a company at the flat rate of one anna sanctioned for companies—a result which the Allahabad High Court has rightly described as “sufficiently startling to cause surprise and to lead one to look for language absolutely unambiguous and positive in its terms to create a special liability of that sort which it would be unlikely that any Legislature would intend to impose if it really understood what it was doing.” Now take the case of an unregistered firm converting itself into a limited company as in the present case of the Western India Turf Club. Under the law (section 55 of the Act), the profits of an unregistered firm when they exceed Rs. 50,000 are liable to super-tax at the scale rates of one to six annas and the partners of the firm are *not* liable on their shares obviously because the firm bears the *full* burden of super-tax. If on account of the conversion of such a firm into a company, super-tax is levied only at the flat rate of one anna treating the profits made by the unregistered firm as those made by the company and at the same time the partners are to be exempted, the profits earned would escape full taxation inasmuch as there are no dividends liable to super-tax at the scale rates as in the case of profits earned by a company itself. Again taken the contrary case of a company converting itself into an unregistered firm. If the profits made by the company be made to pay super-tax not at the flat rate of one anna, but at the scale rates of one to six annas as if they were profits earned by the unregistered firm itself, there would be heavy super-tax payable on the profits of the company and, at the same time, the dividends paid out of them would be liable at one to six annas in the hands of shareholders. There is the possibility of some parts of the profits thus paying twelve annas in the rupee as super-tax. Such inequitable results would thus follow if the interpretation of section 26 as laid down by the Allahabad High Court be not followed. For these reasons, I am respectfully inclined to take the same view of the meaning and scope of this section 26 as that taken by the Allahabad High Court and to express my full concurrence with what their Lordships stated in their decision regarding it, viz., “the conversion of the firm into a company does not in any way affect the profits made by the firm before the conversion or the legal liabilities to income-tax which already existed before the conversion. All that the conversion affects is to cause the company to step into the shoes of the defunct firm as assessee for the period of assessment; but it goes without saying and is recognised throughout the scheme contained in the Act, that the liability to assessment is not conclusive as to the chargeability in respect of the period for which such assessment is made.” There is no doubt that section 26 merely fixes the liability to pay the tax on the company. The chargeability to super-tax depends on section 58 which lays down that in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm, or other association of individuals not being a registered firm, an additional duty of income-tax (viz., super-tax) shall be charged, levied and paid in any year at the rate or rates laid down for that year by the Act of the Indian Legislature. (The rates for 1925-26 are laid down in Part II, Schedule III of the Finance Act, 1925) If the income to be taxed is that of a registered firm, it is thus exempt from super-tax as it is not made chargeable by this section; if it is that of an unregistered firm, it is to be charged to super-tax at the scale rates sanctioned for such income. In this connection Your Lordships’ attention is invited to the following extract from the judgment of Lord Dunedin in the case of *Whitney v. Commissioners of Inland Revenue* (1) decided by House of Lords on November 6, 1925.

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"Now, there are three stages in the imposition of a tax; there is a declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, had already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly come the methods of recovery if the person does not voluntarily pay."

6. The arguments which have been advanced so far on behalf of the Club are that it is a company as defined in section 2 (6) of the Act, that a company is liable to super-tax at the flat rate of one anna only and that the decision of the Allahabad High Court relates to income-tax alone and not to super-tax. Enough has been stated in the above paragraphs to show why the tax is to be levied at the scale rates in this case as the profits to be assessed are those of an unregistered firm and not of a company which merely "steps into the shoes of the defunct unregistered firm" for the purpose of the payment of the tax due on these profits. As regards the argument that the decision of the Allahabad High Court applies only to income-tax, it is wholly incorrect. In the first place super-tax is nothing but an additional duty of income-tax as laid down in section 55 of the Act and as section 26 is made applicable to super-tax too by section 58 (1) of the Act, the interpretation of the section as regards income-tax will equally apply to super-tax, word for word. Also the very question before the Allahabad High Court was as regards the liability to super-tax (and not to income-tax) of Messrs. Begg Sutherland & Co., Limited.

7. For the above reasons, I am clearly of opinion that the profits made by the Club in the year 1924-25 when it was not a limited company have been rightly charged to super-tax at the scale rates of one to six annas and that the flat rate of one anna cannot be applied to these profits which are not those of a company having been made prior to the conversion of the Club into a limited concern. My answer to the questions framed in para. 3 above is therefore as under.

(1) The profits are liable to super-tax at the scale rates of 1 to 6 annas and not at the flat rate of one anna.

(2) Section 26 is to be regarded as merely requiring the company to take the place of the defunct firm for the purpose of the payment of the tax due from it on its profits earned prior to the conversion.

(3) The Club is rightly assessed to super-tax at the scale rates of 1 to 6 annas.

(4) It cannot be assessed for the year in question at the flat rate prescribed for a company.

8. A copy of Your Lordships' decision may kindly be sent to me for necessary action as required by section 66 (5) of the Act.

B. J. Desai, instructed by *Craigie, Blunt and Caroe*, for the assesseees.

Kanga, Advocate-General, instructed by the Government Solicitor, for the Crown.

JUDGMENT.

MACLEOD, C. J.—This is a reference by the Commissioner of Income-tax under section 66 (2) of Act XI of 1922. The Commissioner says that the Western India Turf Club was, in the past, being assessed to super-tax on its

total income at the scale rates of 1 to 6 annas in the rupee as an unregistered firm.

From April 1, 1925, the Turf Club converted itself into a limited company by being registered under the Indian Companies Act, VII of 1913, as a Company limited by guarantee. The object of the company thus formed was *inter alia* to take over the assets, effects and liabilities of the unincorporated Club previously known as the Western India Turf Club and to continue its activities. Thus from the above date, viz., April 1, last, the Club became a limited company. For the current financial year 1925-26, it was called upon under section 22 (1) read with section 26 of the Act to put in a return of income for the previous year, namely, 1924-25. It accordingly put in its return of income showing the income earned by the Club as an unregistered firm during the previous year 1924-25 when the company was not in existence. For the purposes of assessment, the Senior Income-tax Officer determined the total income to be Rs. 15,03,522 under section 23 (1) of the Act and calculated super-tax thereon at Rs. 4,59,153 by applying to it the scale rates applicable to an unregistered firm.

The Club contended that as it was converted into a limited company from April 1, 1925, the rate of super-tax applicable to it was that prescribed for a company, viz., the flat rate of one anna per rupee on the balance of the above income after deducting Rs. 50,000. The Income-tax Officer following the decision of the Allahabad High Court in its Miscellaneous Case No. 123 of 1925, *In the matter of Begg Sutherland and Co. Ltd.*, (1), decided to levy super-tax at the scale rates of 1 to 6 annas per rupee.

The Club not being satisfied with this decision called for a reference to the High Court. The questions on which the opinion of the High Court is required are as follows:—

(1) When an unregistered firm converts itself into a limited company, while assessing the latter under section 26 read with section 58 on the income earned by the unregistered firm prior to the conversion, is super-tax to be levied at the scale rates of 1 to 6 annas applicable to the income of unregistered firm or at the flat rate of one anna applicable to the income of a company?

(2) Is section 26 of the Act to be regarded as requiring that the income earned by the unregistered firm be treated as the income of a company and taxed at the flat rate of one anna, or is the section to be taken as merely requiring the company to step into the shoes of the defunct firm for the sole purpose of payment of the super-tax due from it as an unregistered firm?

(3) Whether the assessment to super-tax levied on the Club for the year 1925-26 at scale rates between 1 anna and 6 annas is in order, and

(4) Whether the Club as a limited company should not be assessed to super-tax for the above year at the flat rate of one anna in the rupee?

The Commissioner of Income-tax was of opinion that the profits made by the Club in the year 1924-25 when it was not a limited company have been rightly charged to super-tax at the scale rates of 1 to 6 annas, and that the flat rate of one anna cannot be applied to these profits which are not those of a company, having been made prior to the conversion of the Club into a limited concern. It is unfortunate that the Commissioner has used throughout the expression unregistered firm, as the Western India Turf Club was not a firm but would come within the term "individual" in section 3 of the Indian Income-tax Act, 1922, taken with section 3 (39) of the General Clauses Act, X of 1897. It seems to us the questions propounded admit of a very simple answer.

By section 55 of the Act "In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, Hindu undivided family, company, unregistered firm or other association of individuals, not being a registered firm, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by Act of the Indian Legislature."

Under section 7 of the Finance Act, 1925, the rates of super-tax for the year beginning on the first day of April, 1925, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Third Schedule, and the rate of super-tax in respect of the excess over fifty thousand rupees of total income in the case of every company is fixed therein at one anna in the rupee.

It is difficult then to see how the company can be assessed at any higher rate for super-tax than one anna in the rupee. The total income on which that rate is levied for super-tax is the total income of the previous year, and as the company has succeeded to the business of the Indian Turf Club, it is conceded that the total income of the previous year of the Turf Club, *i.e.*, for the year 1924-25, is the total income on which the company is liable to be assessed for super-tax. It does not seem to us that the decision relied upon by the Commissioner in *In the matter of Begg Sutherland and Co., Ltd.* (1) has any relevance to the facts of this case. The head note is as follows:—

"When a registered firm is converted into a company, the profits of any period anterior to the conversion on which income-tax has not been paid are liable to assessment as profits of a firm, but the new company is liable for the payment of the tax. But the new company is not liable to pay super-tax in respect of any period for which the firm which it succeeded was not liable to pay super-tax."

The firm of Begg Sutherland and Co. which was registered under section 2 (14) of the Indian Income-tax Act, 1922, was converted into a private company with effect from May 1, 1922. The accounting period of the firm ran from May, 1, to April 30, but on the formation of the company it was decided that the accounting period should coincide with the Government Financial year, the first of such periods consisting of eleven months only from May 1, 1922, to March 31, 1923. The assessment for the year 1922-23 was made on the profits of the firm for the year ending April 30, 1921, and the firm was assessed to income-tax at the maximum rate, and the individual partners were assessed to super-tax on the shares of their profits in the firm at the rates appropriate to those shares made by the firm during the period from May 1, 1920, to April 30, 1921. When the assessment of the company was made in the year 1923-24, it was dealt with in two portions.

(1) As regards the profits which arose to the firm in the accounting period of May 1, 1921, to April 30, 1922, and

(2) As regards the profits of the company in the period from May 1, 1922, to March 31, 1923.

In the financial year 1923-24, the profits of the firm were assessed to income-tax at the maximum rate, and the individual partners were assessed to super-tax on their shares of the profits made by the firm during the period May 1, 1921, to April 30, 1922, and in the same year the profits of the company were assessed to income-tax at $1\frac{1}{2}$ annas in the rupee and were also charged to super-tax at the rate payable by the company for the eleven months ending

March 31, 1923. The company was also held responsible under the provisions of section 26 of the Income-tax Act, 1922, for the payment of the demand for income-tax assessed on the profits of the firm for the period May 1, 1921, to April 30, 1922, and this amount together with the demand for income-tax and super-tax charged on the profits for the eleven months ending March 31, 1923, was duly paid. The Commissioner thought that the company should have been assessed for super-tax at one anna in the rupee on the profits which arose for the period May 1, 1921 to April 30, 1922, in addition to the super-tax which had been levied from the partners of the firm on the income they had actually received from the firm.

The first question propounded for the opinion of the Court appearing at page 718 of the report is worded in exceedingly involved language, but the issue seems to have been whether the profits for the period May 1, 1921, to April 30, 1922, were to be assessed as profits of a firm and the company was to be called upon to pay the amount due, or whether, because at the time of the assessment the assessee was a company, the company was to be assessed on the profits made by the firm during its last year, and such profits were to be treated as the profits of the previous year of a company.

The answer of the Court was that the profits for the period May 1, 1921, to April 30, 1922, were to be treated as the profits of a firm, but the company was to be called upon to pay the amount due. Consequently, as the firm had not to pay super-tax, the company was not liable.

It will be seen, as the Court remarked, that, for reasons best known to themselves, by mutual consent the income-tax authorities and the new company dealt with the profits in respect of which income-tax was payable from May 1, 1921, to April 30, 1922, and from May 1, 1922, to March 31, 1923, in the year of assessment, namely, April, 1, 1923, to March 31, 1924. But the question was whether the company which was to be assessed in respect of the last year of existence of the firm for what was undoubtedly payable by law by the company on the profits which the firm had made and on which it would have been assessed if it had continued to exist as a firm, was also liable to be treated as a super-tax paying person, because, although its predecessor was not a super-tax paying person, the company was by the express language of the Act such a person and had to be treated as what it was even in respect of profits made anterior to its existence.

Their Lordships were of opinion that there was nothing in the Act which could justify the income-tax authorities in imposing on a successor during the first year of assessment after the conversion a liability in respect of its predecessor which its predecessor could not have been liable to pay if it had continued in existence without any conversion. There is an initial difficulty in applying this decision to the present case, namely, that the company was assessed in 1923-24 in respect of two different periods, but it has been contended that the *ratio decidendi* is applicable, and that, just as in that case the company was not liable for super-tax on the profits of the last year of the existence of the firm, because the firm as a registered firm was not liable, so in this case the company is liable to pay super-tax on the profits earned by its predecessor for the year previous to its conversion on the same scale as its predecessor would have paid, if there had been no conversion. If the accounting period of the firm of Begg Sutherland and Co., had coincided with the Government financial year, we doubt whether any such question would have arisen, for there would have been no double taxation of the same income although even now we do not see clearly how there was any occasion for double taxation.

debtor was declared insolvent or in the year in which the assessee wrote it off as irrecoverable in his books. Consequently the Income-tax Officer has no discretion to disallow the deduction claimed by the assessee.

Case [Civil Reference No. 29 of 1923] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Punjab, for the opinion of the High Court.

CASE.

This is a reference to the High Court under section 66 (2). The petitioner is Lala Puran Mal, a well-known banker in Simla. For many years he persistently refused to produce his full accounts, and it was not till 1922-23 that he did so. The question then arose as to the proper method of determining his income, profits and gains, from these accounts. There are two main systems of keeping accounts. There is firstly (to quote the Income-tax Manual p. 87) "the cash basis system, where a record is kept of actual receipts and actual payments, entries being made only when money is actually collected or disbursed," and secondly, "the mercantile accountancy system, under which a profit and loss account is maintained and a comparison is made of the value of the stock in hand at the beginning and at the end of each year. Under this latter system, entries are made in the accounts on the date not of receipt of money or expenditure of money, but on the date of transaction irrespective of the date of payment." Where either of these two methods is adopted to the exclusion of the other, there is usually no difficulty in determining income, profits and gains. But where, as frequently happens, especially with money-lenders, accounts are kept partly on one system and partly on the other, this is generally a matter of considerable difficulty, and the Income-tax Officer has then to use his discretion as is allowed by the proviso to section 13, which provides that, "if no method of accounting has been regularly employed, or if the method employed is such that, in the opinion of the Income-tax Officer the income, profits and gains cannot be possibly deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income-tax Officer may determine. In cases of this kind relating to money-lenders, it is usual to take into account all accrued interest whether paid or not, and to allow as a 'bad debt' any interest subsequently found to be irrecoverable. This was the method adopted by the Income-tax Officer in the present case. When the latter came up before me on appeal, as it appeared that the petitioner's accounts were kept partly upon the cash and partly upon the mercantile system, I attempted to distinguish between the two and to apply the principles governing each system according as each appeared to have been followed. My order, dated the 23rd July, 1923 will show that the dividing line was drawn between interest due on mortgage loans and interest due on other loans.

2. The petitioner now desires me to refer the following point to the High Court, viz., "whether interest which is said to have accrued but which has not been received actually or constructively, i. e., by adjustment in the accounts or pro-notes, etc., is liable to assessment, and whether such interest is within the purview of and means income, profits and gains as used in the Act of 1922."

The terms of the reference are taken from the petitioner's application, dated the 20th August, 1923.

It is a question of fact whether a method of accounting has been regularly employed and, if so, whether that method is such that the income, profits and gains can properly be deduced therefrom. This question of fact was decided against the petitioner who now desires a ruling of the

High Court as to whether interest which has accrued, but has not been actually received, can be taken into account in calculating income, profits and gains. In view of what has been said above and of the proviso to section 13, I consider that the assessing authorities had no option but to compute income, profits and gains in such manner as they thought fit. Whether the method actually applied was good or bad is a point of judgment and not of law. I recommend, therefore, that the petitioner's question be answered in the affirmative.

3. The petitioner further asks that the following point may also be referred, viz.,

"whether the bad debts or irrecoverable loans written off in the year of assessment by the assessee should not be allowed off as a deduction in the year of assessment in which they are written off, and whether it is in the discretion of the Collector of Income-tax to disallow such sums as deductions, and further whether it is not open to the assessee to write off such loans or bad debts when he thinks the same to be irrecoverable; and in order to satisfy the Income-tax Department what sort of proof is required to show that such debts or loans are irrecoverable and therefore should be allowed off".

The question in issue, which is not very clearly stated by the petitioner, would appear to be, whether in the present case, the Income-tax Officer (wrongly described as a Collector of Income-tax) had any discretion to disallow bad debts or irrecoverable loans written off in the year which is the basis of the assessment in question.

For income-tax purposes "bad debts" must be distinguished from "irrecoverable loans" (see Income-tax Manual p. 89). A bad debt can only arise under the mercantile accountancy system and never under the cash system. The question, therefore, whether "bad debts" should be allowed, depends entirely upon the method of accounting employed; and when, as in the present case, circumstances are such that the proviso to section 13 has to be applied, it is a matter entirely at the discretion of the assessing authorities. Accordingly the question, whether bad debts should be allowed in the present case, is one of fact and not of law.

The question of irrecoverable loans is somewhat different as the Income-tax Manual says (page 89): "Money lent out on interest is the stock-in-trade of a money lender or banker and the loss of such stock-in-trade can clearly be regarded as a trading loss like the loss of the stock-in-trade of any other trader where the loss is not covered by insurance". But like other losses, they have to be proved to have been incurred in the accounting year which is the basis of the assessment. This is a question of fact, and in the present case, the fact was not proved to the satisfaction of the assessing authorities (see point (b) discussed in my order dated 23rd July, 1923).

It might, I think, be held that both points relating to bad debts and irrecoverable loans respectively, are questions of fact rather than of law. As, however, it may be argued that the interpretation of section 13 of the Act is in issue, I refer petitioner's question as stated above for decision, subject to the following reservation.

It will be seen above that the petitioner asks the High Court to define what sort of proof is required in a case of this kind. This is clearly a point of judgment, upon which it appears to me to be unnecessary for the High Court to give a ruling. This point, therefore, is not referred.

In regard to the rest of the reference in question, I consider that the Income-tax Officer had full discretion under section 13 of the Income-tax Act to disallow the sums in question and recommend decision accordingly.

The case came up for hearing before Mr. Justice Martineau and Mr. Justice Moti Sagar who delivered the following judgments.

MARTINEAU, J. :—Two questions have been referred to us under section 66 of the Income-tax Act XI of 1922. The first is whether interest which has accrued, but has not been received, is liable to assessment and is within the purview of income, profits, and gains. The learned Commissioner is of opinion that the question should be answered in the affirmative. He points out that the petitioner's accounts are kept partly upon the cash basis system and partly upon the mercantile accountancy system, and says that in such a case it is generally difficult to determine the income, profits and gains, and that the Income-tax Officer has to use the discretion given by the proviso to section 13 of the Act, by which if no method of accounting has been regularly employed, or if the method employed is such that in the opinion of the Income-tax Officer the income, profits, and gains cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such a manner as the Income-tax Officer may determine. But section 13 relates only to the method in which the income, profits and gains are to be computed and has nothing to do with the question referred to us, which is whether interest due, but not received, is taxable or not.

Section 4 provides that the Act shall apply to all income, profits, or gains, as described or comprised in section 6 from whatever source derived, accruing, or arising or received in British India, or deemed under the provisions of the Act to accrue, or arise, or to be received in British India. It is not that section, but section 6, which lays down what income, profits, and gains shall be chargeable to income-tax, and the words "accruing or arising" do not occur in section 6.

The matter now in dispute was decided by the Madras High Court in *Secretary to Board of Revenue v. Arunachalam Chettiar* (1), where it was held that interest due, but not recovered, was not income. That was a ruling on a reference made under the Income-tax Act of 1918, and it is contended for the respondent that the law has been changed by the enactment of the Act of 1922, as section 5 of the Act of 1918 provided only for income of the classes mentioned therein being chargeable to income-tax, whereas in the corresponding section 6 of the new Act not only income but profits and gains are made chargeable. But the addition of the words "profits and gains" makes no difference so far as the matter now before us is concerned. I am clearly of opinion that a sum of money cannot be regarded as an income, profit, or gain before it has been received and in fact in the case mentioned above it was held, not only that a sum of money which was not received, but was only expected to be received was not income, but also that the term "profit" as used in section 9 of the Income-tax Act of 1918 was not applicable to an unrealised amount, but meant the difference between the receipts of a business and the expenditure incurred in earning them. I would answer the first question which has been referred to this Court in the negative.

The second question, referred has not been clearly and concisely expressed by the petitioner, nor is the learned Commissioner quite accurate in

saying that the question in issue is whether the Income-tax Officer had a discretion to disallow bad debts or irrecoverable loans written off in the year which is the basis of the assessment in question, as under the section of the Act which is applicable, namely section 24, the assessee is entitled as of right to a set off when the conditions mentioned in the section are fulfilled. The real question in dispute is whether it is open to the assessee to determine in which year a debt should be regarded as irrecoverable, and this may be taken to be the point referred.

In order that assessee may have the benefit of section 24 (1) he must prove, not only that he sustained a loss of profits or gains, but that he sustained it in the year in which he claims to have the amount of the loss set off. The time chosen by him for writing off a debt is not necessarily the time at which the debt actually became irrecoverable, and it is for him to satisfy the Income-tax Officer that it became irrecoverable at that time. He may regard a debt as irrecoverable as soon as the debtor is adjudged an insolvent although there may yet be a likelihood of his being paid from the proceeds of the debtor's assets, or on the other hand, the assessee may hope to be paid in a few years time although in fact all reasonable chance of his recovering his money has gone. I am of opinion that the Income-tax Officer must be the judge of the question whether or not a debt became irrecoverable in the year in which the assessee wrote it off, and that the matter is not one which depends on the choice of the assessee. I would therefore answer the second question, as stated in the amended form mentioned above, in the negative. I would also leave the parties to bear their own costs in these proceedings.

MOTI SAGAR, J. :—I agree with my learned brother that the first question which has been referred to us in this case should be answered in the negative; but I regret that I am unable to agree with him in his reply to the second question.

A sum of Rs. 45,000 was claimed by the assesseees as deduction on the ground that it was written off as irrecoverable in the year which is the basis of the assessment in question. It appears that the debtor to whom the money was advanced became an insolvent and was adjudged as such in 1918. The assesseees hoped to recover at least a portion of their money from the proceeds of the debtor's assets and it was for this reason that they did not write off the debt in the year in which the latter was declared an insolvent. In the year 1922 the assesseees became hopeless of realising anything from the debtor and had the debt written off in their books on the 26th of February of that year. The claim was disallowed by the Income-tax Officer and an appeal against this order was preferred by the assesseees to the Assistant Commissioner under section 30 of the Income-tax Act XI of 1922. The appeal was, however, heard by the learned Commissioner and was dismissed on the 23rd of July, 1923, on the ground that the assesseees were not justified in waiting for 2½ years before writing off the amount. The assesseees thereupon made an application to the learned Commissioner under section 66 (2) of the Income-tax Act praying that the following question be referred to the High Court for decision:—

“Whether the bad debts or irrecoverable loans written off in the year of assessment by the assessee should not be allowed off as a deduction in the year of assessment in which they are written off and whether it is in the discretion of the Collector of Income-tax to disallow such sums as deductions and further whether it is not open to the assessee to write off such loans or bad debts when he thinks the same to be irrecoverable; and in order to satisfy

the Income-tax Department what sort of proof is required to show that such debts or loans are irrecoverable and therefore should be allowed off."

The learned Commissioner was of opinion that the question in issue had not been very clearly stated by the assesseees and that the real question for reference was whether in the present case the Income-tax Officer had any discretion to disallow all debts or irrecoverable loans written off in the year which is the basis of the assessment in question. My learned brother is of opinion that the question for reference has not been quite accurately stated even by the learned Commissioner and that the real question in dispute is whether it is open to the assesseees to determine in which year the debt should be regarded as irrecoverable and that this may be taken to be the point referred to this Court for decision. On this point my learned brother's opinion is that it is the Income-tax Officer who must be the Judge of the question whether or not a debt became irrecoverable in the year in which the assesseees wrote it off and that the matter is not one which depends on the choice of the assesseees. I am unable to subscribe to this view. In my opinion the only person, who can say with some degree of certainty as to when did a particular debt become irrecoverable, is the person to whom the debt was actually due and not a third party who did not know anything about the transaction. In the present case it is not disputed that the debt has, as a matter of fact, become irrecoverable, nor is it disputed that it has been written off in the account books of the assesseees in the year 1922. The only question is what should be the date on which it should be deemed to have become irrecoverable. There is nothing on the record to show that the debt had become irrecoverable in 1918 when the debtor was declared an insolvent and that the assesseees were not justified in hoping that they would be able to recover at least a portion of their debt by the sale of the debtor's property. I do not think that in the present case the Income-tax Officer who did not know anything about the circumstances of the debtor and who made no enquiries into the matter, could be a proper judge of the question whether the debt became irrecoverable in the year in which the debtor was declared an insolvent or in the year in which the assesseees wrote off in their books. The assesseees are very respectable persons and are keeping regular account books and there is no reason to suspect their *bona fides*. It was held in *Ir re, Bishnu Priya Chowdhurani* (1) that the Income-tax Department could not proceed on general assumptions to reject an assessee's verified statement and that if an assessee stated that he had no income from a certain source and the officers of the department disbelieved him, it was for them to prove the reverse. Applying the principle of this authority to the facts of the present case it appears to me that when the assesseees stated that the debt became irrecoverable in 1922 and not on any prior date and the Income-tax Officer disbelieved them, the onus of proving that the debt had become irrecoverable in 1918 and not in 1922 was upon him and not upon the assesseees to prove the reverse. I would, therefore hold that the Income-tax Officer had no discretion to disallow the deduction claimed by the assesseees and that the second question as stated in the amended form mentioned by my learned brother should be answered in the affirmative. In my opinion the costs of this reference should also be paid by the respondent.

On account of this difference of opinion, the case came up for hearing before Mr. Justice Abdul Raoof who delivered the following

JUDGMENT.

ABDUL RAOOF, J.,:—The question referred for decision as stated in the judgment of Mr. Justice Martineau is whether it is open to the assessee

(1) 1 I T C 261..

to determine in which year a debt should be regarded as irrecoverable. The two learned Judges have differed in their opinion as to the answer to be given to the reference on the point. Mr. Justice Moti Sagar would leave it entirely to the assessee to determine the time when the debt became irrecoverable. In his opinion the Income-tax Officer is bound to accept the declaration made by the assessee and if he does not accept it he must prove that that declaration is wrong. In support of this view the learned Judge has relied upon the ruling *In re Bishnu Priya Chowdhurani* (1). What was held in that case was that under the circumstances of that particular case the assessee was held not to be bound to prove a negative. Under the circumstances of the present case the assessee has made a positive declaration that the debt had become irrecoverable in the year 1922 when it had been written off by the assessee. This is a very extreme view to take. S. 24 (1) of the Income-tax Act provides that "Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year". The wording of the section makes it clear that it is to be established by evidence that the loss took place in the particular year for which the assessment was made. Again rule 37 relating to deductions on account of irrecoverable loans embodies the following direction:—

"Where an assessment is made of profits or income from a banking or money lending business, loans which cannot be recovered should be deducted from the assessed profits of such business at the time when such loans can be definitely proved to be irrecoverable".

In my opinion, therefore, it lies upon the assessee to prove by evidence to the satisfaction of the Income-tax Officer that the debt became irrecoverable in the particular year in which the deduction is claimed. Mr. Justice Martineau has expressed the opinion that the Income-tax Officer must be the Judge of the question whether or not a debt became irrecoverable in the year in which the assessee wrote off and that the matter is not one which depends on the choice of the assessee. If the learned Judge means that the matter depends upon the choice of the Income-tax Officer to declare without any proof that the debt became irrecoverable in that particular year, this would be another extreme view to take, but from another passage in the order of Mr. Justice Martineau, it appears that he does not mean this. The passage runs thus:—

"In order that the assessee may have the benefit of section 24 (1) he must prove not only that he sustained a loss of profits or gains, but that he sustained it in the year in which he claims to have the amount of the loss set off".

In my opinion this is the right view to take. I have no doubt that before making up his mind finally on the point in issue the Income-tax Officer will give to the assessee an opportunity to establish by evidence the time when the loan in question became irrecoverable.

[185] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Mr. Justice Spencer, Mr. Justice Krishnan and Mr. Justice Beasley.

[21st April, 1926.]

The Nedungadi Bank, Ltd., Calicut

Assessee*

v.

The Commissioner of Income-tax, Madras

Referring Officer.

Income-tax Act (XI of 1922), Secs. 4 (2) & 10 (2) (ix)—Bank with foreign branches—Consolidated balance sheet for Head Office and branches—Foreign branch profits, claim of exemption for—Contribution to Employees' Provident Fund—Deduction, if permissible as business expenditure.

The Nedungadi Bank Ltd., with its head office in British India and branches in British India, Travancore and Cochin, in its assessment to income-tax claimed that it was not liable to be taxed in respect of that portion of its profits earned by its branches in Cochin and Travancore. The Bank had only one balance sheet showing its net profits with no separate profit and loss account for its foreign branches. All income received by the foreign branches was transferred to the Head Office account and all expenditure directly chargeable against revenue was similarly transferred to the head office account, leaving no balance in the revenue and expenditure account of the branches. The whole income of the head office and branches was amalgamated as one lump sum for ascertainment and payment of dividends, for remuneration of Directors and for creation of special and general reserve funds. The Assistant Commissioner of Income-tax on the above facts and an examination of the accounts found that the foreign branch profits must be treated as having been brought into British India. On a reference to the High Court,

Held, that the whole of the amount shown as the net profits of the Bank in its balance sheet was assessable to income-tax.

On the claim preferred by the Bank under Sec. 10 (2) (ix) of the Act to deduct the amount paid as its contribution to its Employees' Provident Fund,

Held, that as the Bank had not yet paid out to the employees the amounts so set apart, the claim was inadmissible as there was no expenditure incurred within the meaning of Sec. 10 (2) (ix) of the Act.

Smyth v. Streton, 5 Tax. Cas. 36, Referred to.

Case [Referred Case No. 22 of 1925] stated under section 66 (1) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE

I have the honour to refer the following two questions of law which have arisen in connection with the assessment of the Nedungadi Bank, Ltd., Calicut:—

(1) Whether that portion of the Bank's profits Rs. 56,567, which can be conventionally held to have been earned in Cochin and Travancore, can be said to have been brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act.

(2) Whether the moneys set aside by the Bank as contributions to its employees' provident fund can be regarded as "expenditure incurred for the purposes of the business" within the meaning of section 10 (2) (IX).

2. The Bank has its registered office at Calicut and prepares its consolidated Profits and Loss account there. It has 16 branches, 11 in British India

* (1926) I L R 49 Mad. 910; 51 M L J 403; A I R (1926) Mad. 1048; 24 L W 685; (1926) M W N 740; 98 Ind. Cas. 1.

3 in Cochin and 2 in Travancore State. These latter branches in the States are managed by agents who are under the control of the Head Office at Calicut. All fixed deposit accounts are kept at Calicut and at the end of the year when the year's accounts are made up, all the items in the expenditure and revenue accounts of the branches are transferred to the Head Office and incorporated in the accounts there. The Bank has a capital of Rs.48,38,481 consisting of a share capital of Rs. 7,20,720, a reserve of Rs. 2,04,829 and a borrowed capital of Rs. 39,12,932 consisting of deposits, etc. As the branches require funds the Head Office transfers capital to them and debits them with interest in the head-quarters accounts.

3. For the assessment year in question 1924-25 the Bank returned an assessable income of Rs. 1,18,326 arrived at as follows: The income earned in British India according to the separate Profits and Loss account for British India filed by the Bank and marked A was Rs. 1,07,168. To this, income-tax, super-tax and depreciation were added giving Rs. 1,19,268 and Rs. 941 interest on tax-free securities was deducted, leaving Rs. 1,18,326. The Directors' report to the shareholders which included the consolidated Profits and Loss account and the Balance Sheet was also filed—marked B. At the request of the Income-tax Officer separate Profits and Loss account were subsequently filed for Cochin and Travancore, showing a profit of Rs. 6,565 in Travancore and Rs. 29,874 in Cochin. The original British Indian Profits and Loss account had contained a sum of Rs. 95,533 being interest due to the Head Office from the branches in Cochin and Travancore, while the Cochin and Travancore Profits and Loss accounts contained debits of Rs. 58,252 and Rs. 42,385, the bulk of which sum were interest payments to the Head Office by the branches. Subsequently the Bank wrote saying that it wished to revise its original return. The reason put forward was that the Travancore Income-tax authorities had refused to allow it to deduct from its Travancore income the interest paid to the Head Office at Calicut. It therefore claimed to eliminate the whole sum of Rs. 95,533 being the interest credited from Cochin and Travancore from its original return for the British Indian income and to reduce its British Indian income to Rs. 2,156.

4. This absurdly low figure was arrived at by debiting the British Indian branches with all the interest on the borrowed capital of the Bank although a large part of that capital had not been used to earn the profits in British India and at the same time claiming that none of the profits shown in the Cochin and Travancore Profits and Loss accounts had arisen or had been received in British India. During the hearing of the application for a reference the Bank's representative admitted that this extreme position could not be maintained and it was agreed that for the purposes of this reference interest on the Bank's borrowed capital would be distributed among the British India, Cochin and Travancore branches in proportion to the amount of borrowed capital used by them. According to this arrangement the Cochin profits would be Rs. 41,525 and the Travancore profits Rs. 15,042, out of a total profit of Rs. 1,32,398. This arrangement, I hold, is a conventional one made in order to focus the discussion and enable me to put a definite question to the High Court. From the manner in which the Bank carries on its business and keeps its books, I do not believe that the profits earned in Cochin and Travancore can be separately ascertained with any approach to accuracy; but for the purposes of this reference I am prepared to hold, with the agreement of the assesses, that Rs. 75,731 was earned in British India; Rs. 41,525 in Cochin and Rs. 15,042 in Travancore. The question before the High Court is whe-

ther the sum of Rs. 56,567 earned in the Indian States can be taxed as having been brought into British India.

5. In my opinion it is clear that this sum has been brought into British India. The Bank bases its claim that profits have not been remitted on the proviso to section 4 (2). It seems to me that that proviso means that if merely for the purposes of valuing the assets of a business as a whole at the beginning and end of any year (which is the function of a balance sheet) foreign assets are included in the British India balance sheet, that is not to be taken as an indication that the foreign profits have been remitted to British India. In this case there appear to me to be other reasons which indicate that the profits must be held to have been brought into British India. My chief reasons are:—

(a) According to the method of book-keeping followed by the Bank its total profits must be regarded as having been brought to Calicut where the consolidated account is maintained. As the Assistant Commissioner has pointed out in the appeal order—marked C—there was at the end of the year no profit left at the Indian State branches.

(b) The payment of dividends from British India and the appropriation of the total profits there seem to me conclusive proof that all the profits were brought into British India. The dividends could not have been paid out of capital and they have not been paid out of reserve of previous year's profits as the reserve funds have been substantially increased, the general reserve going from Rs. 1,29,021 to Rs. 1,63,827 and the special reserve from Rs. 35,710 to Rs. 41,001.

(c) The Company I consider, has admitted that all its profits have been brought into British India, for it has issued certificates to its shareholders under section 20 of the Income-tax Act to the effect that its total profits have paid or will pay British Indian Income-tax.

6. Regarding the second question I hold that the Bank has not yet incurred this expenditure which it now claims. According to the rules of the Provident Fund, employees have to contribute certain sums out of their salary, the Bank contributing an equal sum. Under Rules 6 and 8 the Bank may retain its own contribution if the employee vacates his office before completing 12 years' service or is dismissed for any misconduct. Under Rule 7 payment of the Bank's contribution to servants dying or becoming disabled before completing 12 years' service is at the discretion of the directors. The Bank therefore retains a certain amount of control over its contributions to the Fund. They continue to remain an asset of the Bank in the nature of a reserve. It cannot be held that the Bank has parted with these sums. If it has and if an employee misbehaves how will the forfeited subscriptions be shown in the accounts in future years? They cannot be shown as a receipt, for the Bank has not received them from any outside source. The departmental practice is to refuse to allow contributions by employers to provident funds so long as the employers retain a measure of control over the funds and to allow all payments actually made by way of pension or gratuity. That practice is, I maintain, both legal and equitable. It has been accepted by the accredited representatives of the mercantile community throughout India.

Order of Mr. E. W. Clarke, Assistant Commissioner.

The above Bank was assessed to income-tax and super-tax by the Income-tax Officer, Malabar, on an income of Rs. 941 from interest on securities and Rs. 1,31,357 from banking. The Secretary of the Bank objects to the assessment on the ground that the income earned by the Bank from its transactions in Cochin and Travancore should not have been included in the income assess-

ed and that a sum of Rs. 2,137 being the Bank's contribution to employees provident fund should have been allowed as a business deduction. The Bank has its head-quarters at Calicut with branches in British India and in Cochin and Travancore States. The Bank first returned an income of Rs. 1,18,327 as income from British India. In arriving at this income interest was calculated on amounts advanced by the Head Office to branches outside British India for investment there and added to the income. Subsequently the Bank amended its return deducting from the income already returned a sum of Rs. 97,670, made up of Rs. 95,533 originally taken into account as interest on advances to foreign branches and a further sum of Rs. 2,137 being Bank's contribution to employees' provident fund. The amended return thus showed an income of Rs. 20,656 out of which the Bank also claimed to deduct the remuneration paid to the Managing Director namely Rs. 15,499 and bad debts debited to bad debts reserve namely Rs. 1,584, leaving a net income of Rs. 3,573 which it was contended was the net income earned in British India.

2. The Income-tax Officer dealt at length with the question as to how much of the Bank's income was actually earned in British India. He pointed out that the amended return was obviously incorrect on the ground that as the Bank paid during the year on dividends alone in British India a sum of Rs. 67,704, the income earned and received in British India should have been at least that amount. The Income-tax Officer also pointed out that whereas all deposits (borrowed capital) were accounted for in the head office of the Bank which is in British India only items of money lent out were accounted for in the foreign branches. The result was therefore that whereas all interest payments were brought to account in the head office the foreign branches accounted only for interest receipts and as the foreign branches had no capital of their own and were obviously dependent on the head office for the supply of capital including borrowed capital, the result was that the greater portion of the income of the Bank as a whole was treated as income earned outside British India while the entire expenditure of the Bank on account of interest payment was treated as a deduction in full against only so much of the income as was earned in British India. The Income-tax Officer therefore held that the action of the Bank in first charging its branches a sum of Rs. 95,533 as interest on amounts advanced to these foreign branches was technically correct and that it was wrong for the Bank to have claimed subsequently that this interest adjustment should not have been made. The Income-tax Officer furthermore went on to show that according to the method of accounting employed by the Bank all branch profits were finally credited to the head office and amalgamated with the British India profits of the year of account and he argued that this was tantamount to the remittance to British India each year of the profits made by the foreign branches and that therefore the whole profit of the Bank must be held to have been received in British India.

3. The Secretary of the Bank holds that he was justified in writing back the interest adjustment amounting to Rs. 95,533 on account of advances to foreign branches for the reason that when the income of the foreign branches in Travancore State was assessed to Travancore Income-tax, he was not allowed by the Income-tax authorities there to claim the interest charged on the Travancore branches as an item of expenditure. The result, he points out, is that the same income is assessed both in Travancore and in British India and the Bank has therefore to pay tax twice. The Secretary also contends that the Income-tax Officer was not justified in presuming that the Bank's investments outside British India must have been made up of borrowed capital and lastly he argues that it has been the practice of the Bank not to

bring the profits of the foreign branches into British India but to allow them to remain with the foreign branches for employment there for the purposes of business.

4. As regards the first contention there is no force in the argument that the same income should not be assessed both in Travancore and in British India. This is an event which happens frequently in the case of people who have business both in Travancore and British India, and as it has been recognised that this double taxation involves a certain amount of hardship rules have been framed which provide for the grant of refunds in respect of income that has suffered double taxation. It is open to the petitioner to apply for the refund as a relief.

5. The second contention is only partially correct. I see from the Bank's balance sheet that it had a capital of Rs. 7,20,720 on the 31st December, 1923, whereas the borrowed capital amounted to nearly Rs. 40,00,000. The investments in the foreign branches in Cochin and Travancore on the same day exceed Rs. 16,00,000 which is more than double the Bank's capital. Obviously therefore a considerable portion of the Rs. 16,00,000 represents borrowed capital on which the head office is perfectly justified in charging its branches a portion of the interest it had to pay itself on borrowed capital. While therefore the petitioner's contention that no borrowed capital was employed in foreign branches is wrong, it is also not correct to say that the entire amount employed outside British India must represent borrowed capital only. But this point is of no importance in regard to the present appeal for the reasons given in the following paragraph.

6. The whole question as to the manner in which the income of the foreign branches should be treated depends on the manner in which the revenue and expenditure accounts from which the profit is ascertained are dealt with by the branches. The accounts of the Ernakulam branch (as a sample of a foreign branch) were produced before me and from these accounts I found that at the end of the year all income received by the foreign branch was transferred to the head office account and all expenditure directly chargeable against revenue was similarly transferred to the head office account. The result was that at the end of the year after these transfers had taken place there were no balances left in the revenue and expenditure accounts of the branch office from which a profit and loss account could have been drawn up. Furthermore I found that in the course of the year there was a frequent flow of remittances to and from the head office and the branch office. Remittances of course are not always made in money. Book adjustments are also remittances. Actual cash remittances or remittances in the way of hundies take place only when there is an actual need of cash or ready money. The business of a bank is built up entirely on the system of credit. All its transactions are not necessarily cash transactions in which cash passes over the counter. There are many transactions and adjustments between branches of a business and its head office and even with outsiders which do not record the actual passage of cash from one to the other. But for all practical purposes the effect of such transactions is equivalent to the actual receipt or payment of cash or value. There can therefore be no force in the argument that the mere book transfer of all profits and expenses from the branch office to the head office does not amount to actual transfer or remittance of profit. As a matter of fact once the profits and expenses have been transferred by a regular book transaction from the foreign branch to the head office there are no materials left at the branch office for the drawing up of a profit

and loss statement, the profits from which can be held to have remained with the branch office so as to be available to the branch for employment for its own business as argued by the Secretary. In deciding the question as to whether the profit of a foreign branch has or has not been remitted a useful test to apply is to ascertain how the profit would be remitted should an occasion arise for this to be done. I accordingly asked the petitioner's Vakil to explain to me how he would show in the Ernakulam accounts a remittance of any profit from that branch. He was unable to explain how the transaction would be recorded and said that the advice of an expert accountant would have to be obtained. I am afraid even the advice of an expert accountant would be of no avail. It is impossible to remit a profit which has already been remitted and to devise means by which an impossible transaction should be recorded. As already explained at the end of the year 1923 all profits of the Ernakulam branch and all expenses had been transferred, paid, sent away, remitted (use which term you like) to the head office and there were therefore no materials available for drawing up a profit and loss statement from which any portion of the profits could be remitted. The actual result of the transfer entries in the branch accounts has been to reduce the debt due by the branch to the head office and the reduction of debt in such cases can only be secured by payment or in other words remittance. The conclusion, therefore, is obvious in this case that according to the transactions recorded in the foreign branches of the Bank the entire profits of all these branches had actually been remitted to the head office in British India by book transfer and therefore the Income-tax Officer was perfectly justified in assessing the bank of its entire income derived from all transactions both in and outside British India, which in a round about way he has done.

7. As regards the claim to deduct the Bank's contribution to the employees' provident fund it is admitted that this fund is not an irrecoverable trust. Such contributions can only be over which the bank authorities have no power or control beyond that exercised by trustees. The claim in question cannot therefore be allowed.

In dealing with this appeal I find that the Income-tax Officer did not include the income from forfeited shares which had been transferred to reserve account. This is an item of income which ought to have been assessed. But as this amount involved, viz., Rs. 768 is comparatively small I shall not enhance the income on this account.

The assessment in this case is accordingly confirmed and the appeal dismissed.

T. V. Muthukrishna Aiyar, for the assessees.

M. Patanjali Sastri, for the Crown.

JUDGMENT

SPENCER, J. :—The first question referred to us relates to the liability to income-tax of the profits of the Nedungadi Bank at Calicut which are asserted to have been earned in Cochin and Travancore. This Bank has these two branches outside the limits of British India. Under section 4(2) of the Income-tax Act the profits and gains of a business accruing or arising outside British India may be deemed to have accrued or arisen in British India, provided that they are received or brought into British India within three years of the end of the year in which they accrued. The balance sheet of this Bank for the year ending 31st December, 1923 shows Rs.1,38,460 as net profits of the Bank. No separate account has been drawn up to show what the profits in its branches amounted to. There is only one account and no separate profit and loss account of the branches. This sum of

Rs. 1,38,460 is shown in the Appropriation account of the credit side, and the unappropriated balance of the previous year is added to it; and on the debit side figures are given which show how these profits were distributed, e. g., Rs. 71,000 were paid out in dividends; Rs. 20,000 as Managing Director's remuneration; Rs. 2,869 towards Provident Fund; and certain amounts were allotted to the special reserve funds which included bad debts, pensions and gratuities; and the balance of Rs. 24,000 is transferred to the balance sheet. There is no reserve fund representing the profits of the branches kept apart from this general fund. The Assistant Commissioner in his order concluded that the entire profits of these branches had been actually remitted to the office in British India by book transfer, because, as he finds, the profits and expenses have been transferred by a regular book transaction from the foreign branch offices to the head office, and there are no materials left at the branch offices for drawing up a separate profit and loss statement. Therefore the profits which may be held to have remained with the branch offices so as to be available for the branches for employment for their own business are not ascertainable, and no balance is left at the end of the year in the revenue and expenditure account of the branch offices from which a profit and loss account could have been drawn up, all income received by the branches having been transferred to the Head Office account and all expenditure directly chargeable against revenue having been similarly transferred to the Head Office account. The explanation to section 4 merely states that profits or gains arising outside British India are not necessarily to be deemed to be brought into British India by reason that they are taken into account in the balance sheet. It seems to me that in this case there has been a good deal more done to the profits arising out of the transactions in the branch banks than merely taking them into account in the balance sheet for the information of the shareholders. These sums have been amalgamated with the net profits of the head office and out of the amalgamated sum dividends have been paid and directors have been remunerated, and otherwise the branch banks' profits have been appropriated. Under such circumstances I am prepared to hold that the sums which were appropriated for payments made at the head office must be deemed to have been "received or brought into" the Calicut office, which is in British India, and therefore that the whole of the amount shown as net profits of the Bank is liable to income-tax.

The second question is whether the Bank can exclude the amount paid as contribution to the employees' provident fund under the heading of "expenditure incurred for the purpose of the business" within the meaning of section 10, clause (2) (ix). It appears that the Bank makes itself liable for paying a certain proportion of the sums which are invested with itself for the benefit of its employees. Until the employee withdraws the amount standing to his credit in the Provident Fund, it is no "expenditure" for the purpose of the business but only a liability. The case quoted on behalf of the assessee *Smyth v. Stretton* (1) can be distinguished on the ground that in that case the College invested £35 annually for the benefit of its assistant masters in an insurance fund. The money was actually paid out to the insurance company and was claimed as an expenditure. Upon these facts the High Court held that each master had obtained an addition to his salary on which he was liable to pay tax. The liability of Dulwich College which made those contributions was not considered at all. Even supposing that the College treated those sums as expenditure, it does not follow that the

(1) 5 Tax Cas. 36.

Bank in the present case can so treat these amounts which have not been actually expended. I therefore consider that the second question should be answered in the negative.

KRISHNAN, J. :—This is a reference under section 66 (2) of the Income-tax Act of 1922 by the Commissioner of Income-tax with reference to the assessment of income-tax of the Nedungadi Bank at Calicut. That Bank has branches both in British India and Travancore and Cochin. The first question submitted for our opinion is, "whether that portion of the Bank's profits Rs. 56,567 which can be conventionally held to have been earned in Cochin and Travancore can be said to have been brought into British India within the meaning of section 4 (2) of the Indian Income-tax Act."

Section 4 (2) refers to profits and gains of business arising outside British India of a person resident in British India. The Nedungadi Bank has its head office in British India, namely at Calicut. The question is whether the profits and gains of its business carried on in Travancore and Cochin can be said to have been brought into British India so as to be liable to income-tax. The question really turns upon the way in which these profits and gains have been treated by the Bank. The Assistant Commissioner of Income-tax in his order has gone into the facts very fully and has come to the conclusion that the profits and gains made in Cochin and Travancore must be treated as having been brought into British India, and the Commissioner of Income-tax has supported that conclusion. The reasons are fully set out in the Assistant Commissioner's order where he points out the way in which the accounts were kept. All the income received by the foreign branches was transferred to the Head Office account and all expenditure directly chargeable against revenue was similarly transferred to the Head Office account in both the head office and the branch offices in Cochin and Travancore. The result was that at the end of the year after these transfers took place there was really no balance left in the revenue and expenditure account of the branch offices, the amount being treated as having been transferred to the head office account. As pointed out by him, there was a frequent flow of remittances to and from the head office and the branch office. Flow of money by book entries can also amount to remittances. There seems to be ample evidence which justifies the Assistant Commissioner's conclusion that the balances with the branches in Travancore and Cochin were really remitted to or brought into the head office at Calicut. The way in which the profit and loss appropriation account is made out certainly seems to show that the whole income of the branches and the head office was treated as one lump sum for the purpose of ascertaining and payment of dividends. The balance is dealt with as partly special reserve funds and partly as a general reserve fund; so that the whole profits including the profits of the branches in Cochin and Travancore are dealt with in Calicut. When moneys are remitted without any special allocation to profit or capital accounts, between the branches and the head office of the Bank, the contention that the profits were kept back in the branch offices and only other moneys were remitted to the head office cannot possibly be accepted. It is quite true that for the payment of dividends there was enough money obtained as profits and gains by the branches in British India alone. But the payment of the dividends was not restricted to those profits as shown by the way in which these accounts were kept by the Bank and its branches. This is not a case merely of reliance being placed upon the balance sheet for the purpose of holding that the profits and gains were brought into British India, which is a matter dealt with by the explanation to section 4. Here there is very much more evidence to make

it quite clear that the amounts earned as profits in the foreign branches were transmitted to the head office and treated as so transmitted for the Bank's purposes and for payment of dividends. We are not bound to go into questions of fact in a reference under section 66 (2). We must take the facts as stated by the Commissioner, and unless it can be established by the assessee that there is no evidence to support the finding of the Commissioner that the profits were brought into British India, we cannot decide the question in his favour. I am of opinion that there is sufficient evidence to justify the finding of the Income-tax authorities, and on that ground I answer the first question in the affirmative.

The second question referred to us is with regard to the employees' Provident Fund which the Bank has maintained. For every rupee paid up by the employee which represents a certain proportion of his pay every month the Bank contributes the same amount and the two amounts are entered in the Bank's books to the credit of the employee in question. It is claimed that the Bank is entitled to deduct the sums contributed by the Bank towards this Provident Fund under section 10 (2) (ix), as expenditure incurred solely for the purpose of earning profits or gains. If the money had been spent by the Bank, no doubt section 10 (2) (ix) would apply. But in the case before us it is clear that the Bank has not yet spent the money; all that it has done is that it has made entries in its books admitting liability on its part to pay a certain sum of money to the employee when he retires or goes out of office. That cannot be treated as an expenditure by the Bank. The expenditure will take place only when it pays, and it will be time enough to claim deduction then. The deduction cannot be allowed now. I would therefore answer the second question in the negative.

Costs payable by the assessee will be Rs. 250.

BEASLEY, J.:—I agree.

[166] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley.

[23rd April, 1926.]

Mangalagiri Sri Umamaheswara Gin and Rice Factory
Ltd., Guntur

... Assessee in Ref.
Cas. No. 4 of 1925.

Guntur Merchants Gin and Rice Factory Ltd.,
Guntur

... Assessee in Ref. Cas.
No. 6 of 1925.

v.

The Commissioner of Income-tax, Madras ... Referring Officer*
*Income-tax Act (XI of 1922), Sec. 10 (2) (vi)—Company incorporated for
milling rice—Lease of mill to another company—Lessors to bear loss by wear and tear
—Depreciation allowance—Lessors, if carrying on business.*

A limited company incorporated for the purpose of milling rice, acting in pursuance of authority given in the memorandum of association, leased out the buildings, plant, machinery, etc., to another company for a fixed annual rent. Under the lease the lessees were to do the necessary repairs and to hand back the mills in good working order, while the lessors were to bear the loss by depreciation by wear and tear caused

* (1926) 51 M L J 360; A I R (1926) Mad. 1032; 24 L W 680; (1926) M W N 808; 97 Ind. Cas. 850.

by the working of the mill. On an assessment to income-tax on the rent received under the lease, the company claimed an allowance for depreciation under Sec. 10 (2) (vi) of the Income-tax Act.

Held, that the company was carrying on the business of letting a rice mill and as such was entitled to a deduction for depreciation of the lettable value of its property by reason of the wear and tear of the machinery which they had to bear under the lease.

Cases [Referred Cases Nos. 4 & 6 of 1925] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, 1922 (XI of 1922), I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following question which has arisen in assessing the above Company:—

"Whether the allowance provided in section 10 (2) (vi) of the Indian Income-tax Act, 1922, is admissible in computing the income of an assessee who has leased out his plant, machinery and buildings."

2. The assessee in this case, the Mangalagiri Sri Umamaheswara Gin and Rice Factory, is a company incorporated under the Indian Companies Act, 1912. It was registered on the 11th January 1921, and according to its Memorandum of Association its objects are:—

(1) To prepare and sell raw rice, boiled rice, cotton, cotton seeds, bran, husk and

(2) To purchase and lease out buildings, vacant sites and lands. There is a subsidiary provision in the articles to the effect that, "If it is deemed beneficial to the Company with reference to circumstances it may lease or give its factory for contract." In accordance with this provision the Company instead of working its mill on its own account leased it out to Messrs. Parapalli Subbarayadu and R. Punniiah on 29—3—23 for a consideration of Rs. 1,500 per annum. The terms of the lease were that the machinery was to be kept in good working order by the lessee (repairs being executed by him) but that the lessor was to bear the cost of any renewals worth more than Rs. 100, *i.e.*, for practical purposes the lessor was responsible for wear and tear.

3. For the assessment of the year 1924-25 the Company furnished a return of its income to the Income-tax Officer, Guntur. It showed therein that its income during the previous year was Rs. 995 and claimed a further deduction of Rs. 1,037 on account of depreciation under section 10 (2) (vi). The Income-tax Officer refused to allow depreciation as, in his opinion, the Company was not entitled to this allowance under section 10 (2) (vi), and made the assessment on a taxable income of Rs. 995. The Company's appeal to the Assistant Commissioner of Income-tax, Guntur, against the assessment was dismissed on similar grounds.

4. The Company has now asked me to state a case to the High Court under section 66 (2) of the Income-tax Act. As the question involves the interpretation of section 10 (2) (vi) of the Act read with section 10 (2) (iv), I state the case as framed above.

5. In my opinion the allowance claimed is not admissible. In order to make an assessee eligible for the allowance under section 10 (2) (vi), two conditions have to be satisfied, namely:—

(1) that the buildings, machinery, plant, *etc.*, in respect of which depreciation is claimed are the property of the assessee; [Section 10 (2) (vi)] and

(2) that they are "used for the purposes of the business" [Section 10 (2) (iv)]. In the present case the first condition is satisfied but the second is not. The machinery and plant in question is not used by the petitioners in their capacity as lessors of the factory but by the firm of Messrs. Parapalli Subbarayudu and R. Punniiah who actually carry on the processes of milling in the factory. Before an assessee can claim the benefit of section 10 (2) (vi), it must be clear that he is making the profits by using and causing the wear and tear of the machinery, buildings, plant etc., In the present case the buildings, machinery, etc., are used by the lessees and the wear and tear is caused for the purpose of earning their profits and not those of the assessee.

6. I may add that the petitioners in the event of their claim under section 10 (2) (vi) not being admitted urge that in equity they should be given the allowance and pray that it be given under section 9 (1). In regard to this, I need only say that where the legislature has prescribed certain definite allowances and laid down the conditions under which they may be granted, it is not my sphere, nor that of a court of law, to enquire into questions of equity. The depreciation allowance claimed clearly cannot be granted under section 9 (1) as that section only relates to "property consisting of lands and buildings appurtenant thereto." The income derived from the lease of machinery and plant is not income from property within the meaning of the Income-tax Act.

Ch. Raghava Rao and A. Sundaram Aiyar, for the assessees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

COUTTS TROTTER, C. J. :—The assessees in this case are a limited company registered on the 11th January, 1921, which is the owner of a mill equipped with machinery for the milling of rice. The company elected not to work its mill on its own account but leased it out to another firm in consideration of Rs. 1,500 per annum which it is entitled to do under the provisions of its memorandum and articles of association. I think it is clear that the assessees cannot come to Court and ask for deductions on the footing that they are carrying on a business of rice milling. The business they are carrying on is that of lessors of a building which derives its lettable value from the fact that it is equipped with certain machinery which is available for the purpose of milling rice. And of course it is on that lettable value that the lessors have been assessed. It seems to me that this is not infrequent case of the same building and its contents being taxable both in the case of the lessors and the lessees. Different deductions will be allowable in the case of the lessors and the lessees. The lessors as carrying on the business of letting a rice mill can justly deduct from their assessment any sum which is due to depreciation of the lettable value of the property by reason of wear and tear of machinery which falls upon them under the contract of lease. Similarly the lessees being taxable as carrying on the business of rice-milling will be entitled to a deduction of such repairs as fall upon them under the lease. The Crown does not suffer from the fact that the parties can distribute the incidence of the liability for repairs as they choose, because only one total sum can be allowed as deduction. If that principle be right it answers the question raised by the case and it is not our function to apportion which deduction can be rightly claimed by the lessors and which by the lessees, which is a matter for the Commissioner to work out as a question of fact.

KRISHNAN, J. :—This is a reference under section 66 (2) of the Indian Income-tax Act (XI of 1922); the question referred for our decision is

"whether the allowance provided in section 10 (2) (vi) of the Act is admissible in computing the income of an assessee who has leased out his plant, machinery and buildings." The Commissioner has answered the question in the negative. Section 10 (2) (vi) is as follows:—"In respect of depreciation of such buildings, machinery, plant or furniture being the property of the assessee a sum equivalent to such percentage on the original costs thereof to the assessee as may in any case or class of cases be prescribed."

The assessee here is a limited company formed primarily for the purpose of milling rice; and to carry out that object the company had acquired buildings, mill machinery and plant. They did not however carry on that business. There is a provision in the memorandum of association authorising the directors to lease out the mill to third parties for rent if it is beneficial to the company to do so; acting under this authority the mill was leased out to certain lessees for a fixed annual rent for a period of 3 years. The arrangement was that the lessees were to work the mill and take the profits, and do the necessary repairs to it and hand it back at the end of the period to the lessors in proper working order; the lessors were however to bear the loss by depreciation by wear and tear caused by the working of the mill. The company is assessed on the rent received by them. It is clear from the facts that the company was carrying on the business of letting the mill for purpose of being worked by the lessees.

As very correctly observed by the learned Commissioner of Income-tax two conditions must be fulfilled by the assessee before they become entitled to the deduction claimed for depreciation under section 10 (2) (vi); the property depreciated must belong to the assessee and must be "used for the purpose of the business". The first condition is admittedly fulfilled. But the Commissioner thinks the second is not. I am inclined to think he is not right in that view. The business here is the business of leasing the buildings and mill machinery for being worked as a mill. The rent received is not only for the use of the mill but also to cover the necessary wear and tear. A portion of that rent represents the loss by wear and tear. The lease being of the mill as a working concern it is not straining the language of clause (vi) to hold that the machinery and building are used for the purpose of the lease and that the depreciation caused to them by wear and tear arises, so far as the assessee is concerned from that user. Though the direct cause of the wear and tear may be the working of the mill by the lessees such working is authorised by the lease and is part of the business of the lease; that part of the rent which represents the loss due to depreciation is not really income to the lessors but is meant to make good the loss on capital value of the machinery. I agree with the learned Chief Justice in holding that the assessee here are entitled to a deduction for depreciation of their buildings, machinery and plants which under the lease they have to bear. What that amount properly is for the year of assessment is for the taxing authorities to find. My answer to the reference on the facts of this case is as stated above.

BEASLEY, J. :—The only point upon which I had any doubt was whether it could be said that the assessee were themselves carrying on business, because it is not only necessary for an assessee before becoming entitled to the deduction for depreciation under section 10 (2) (vi) of the Act to be the owners of the property in respect of the property depreciated but that also that property must be used for the purpose of the business. There is no doubt, of course, that the assessee are the owners of the property; but is the property used for the purpose of the business? This is a case of a limited company formed for the purpose of milling rice and in pursuance of

that object the company acquired buildings, mill, machinery and plant. The company is, however, authorised in the memorandum of association to lease out the mill to other people for rent. The company did not carry on the business of milling rice; it availed itself of the authority given to it of leasing out the mill for a fixed annual rental. The lessees worked the mill and took the profits and under the lease had to do the necessary repairs to the mill. They had not however to bear loss by depreciation by wear and tear and it is in respect of the latter loss that the company claims the deduction under section 10 (2) (vi). The Commissioner of Income-tax has held that the property is not used by the assessee for the purpose of the business, but I agree with the learned Chief Justice and with my brother Krishnan J., that the view he has taken is incorrect. The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore, to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant.

Government will pay the assessee in each case Rs. 100 for their costs.

[167] IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

Before Sir Amberson Marten Kt., Chief Justice and Mr. Justice Kemp.

[29th November, 1926.]

Sir Dinshaw Manockji Petit

.. .. .

Assessee.

v.

The Commissioner of Income-tax, Bombay

..

Referring Officer.

Income-tax Act (XI of 1922), Secs. 8, 14 (2) (a) and 55—Super-tax—One man company—Assessee holding shares and securities—Sale to private company in return for shares therein—No formal transfer—Income from shares advanced to assessee as loan—Enquiry into real nature of company—Loans, if withdrawal of income—Income assessable as assessee's personal income.

The assessee holding shares and securities of considerable value formed four limited private companies with whom he agreed to sell the said shares in various lots in return for the allotment of their shares. By a contemporaneous indenture the assessee executed a declaration of trust which recited an agreement that the shares and securities sold should not be transferred until the companies should call upon him to do so and that in the meantime he and his nominees should hold them as trustees for the companies, hand over the income to them and transfer them whenever called upon to do so. No formal transfer of the shares which continued to remain in the assessee's or his nominee's name was called for by the companies. The entire subscribed capital of 30 to 40 lakhs for each company was held by the assessee with the exception of shares of the face value of Rs. 30 held in the names of his employees entirely under his control and under the articles of association, the assessee was given complete control over the companies as the Governing Director. As soon as the dividend and interest on the shares and securities were received by the assessee, a book entry was made in the books of the companies crediting them with the amount and on the same date a debit entry was made debiting the assessee with the same amount as a loan made to him by the companies at 6 per cent. interest with no security or voucher. Nothing was paid by the assessee towards these loans and interest thereon which had amounted to over 7 lakhs of rupees. Though the memorandum of association contained 38 objects, the companies did no business beyond ostensibly receiving the dividends and interest on the shares and securities and handing them over to the assessee as loans and no dividend was declared by them since their formation six years ago.

The assessee on an assessment to super-tax in respect of the income from the said shares and securities as forming part of his total income contended that the income was the income of the companies liable to super-tax as their income and not his personal income. On a reference to the High Court.

Held, that on the facts of the case the income belonged to the assessee personally, there being no genuine transfer or declaration of trust in favour of the companies and that the alleged loans to the assessee from the companies were not genuine loans but were mere withdrawals of income disguised as loans.

In respect of the transfer of the ownership of the shares and securities, a regular transfer alone is not the sole convincing proof thereof.

In the case of assessment of what is known as one man company, it is permissible in law for the assessing authorities to enquire regarding its genuineness and the real nature and meaning in res-

pect of the income appearing in its accounts as received by it, though it will be quite wrong to start with the presumption that its transactions are sham ones.

Commissioners of Inland Revenue v. Sansom ; (1902) A. C. 83, discussed.

Case [Civil Reference No. 20 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bombay, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, India (hereinafter referred to as the Act), and at the instance of Sir D. M. Petit, Bart., (hereinafter referred to as the assessee), I have the honour to submit for Your Lordships' opinion certain questions of law categorically set out in paragraph 15 below arising out of the super-tax assessment of the assessee for the current year. They relate *inter alia* to sections 8 and 14 (2) (a) read with sections 16 (2), 55 and 58 of the Act.

2. **FACTS OF THE CASE :—**For the current financial year 1925-26, the Income-tax Officer, A-Ward, Bombay, calculated the total income of the assessee liable to super-tax at Rs. 11,35,102 and levied super-tax amounting to Rs. 3,20,975-12-0 on it. This income of Rs. 11,35,102 included the following two items which are disputed by the assessee and which are the subject matter of this reference :

(1) Rs. 2,76,800 on account of interest on securities standing in the name of the assessee himself, and

(2) Rs. 1,14,004 on account of dividends on shares in limited companies standing in the name of the assessee himself or his nominees.

3. The Income-tax Officer regarded the above two items as forming part of the assessee's total income as the shares and securities which produced the income covered by them stood in his own name or in the name of his nominees and so were regarded as his own property.

4. The assessee, on the other hand, contended that these items formed the income of certain private limited companies formed by him and that therefore those limited companies were liable to super-tax in respect of them and not he himself. The following is a list of the private companies formed by the assessee showing the amount of income out of the above two items which is alleged to be the income of each of the companies :—

Name of the Company.	Income from	
	Interest on Securities.	Dividends of companies (after deduction of I. T.)
1. Petit Limited ..	Rs. nil.	Rs. 24,900
2. The Bombay Investment Co., Ltd., ..	nil.	23,562
3. The Miscellaneous Investment Co., Ltd., ..	nil.	59,744
4. The Safe Securities Co., Ltd., ..	2,76,800.	nil.

5. Super-tax is leviable on limited liability companies at the flat rate of one anna in the rupee after allowing the statutory deduction of Rs. 50,000. As regards individuals, it is leviable at the scale rates of 1 to 6 annas, starting with one anna for the first fifty thousand rupees after allowing the statutory deduction of Rs. 50,000 and rising by $\frac{1}{2}$ anna for each subsequent Rs. 50,000 up to a maximum of 6 annas. If the above amounts be taken to be a part of the income of the assessee, they would be liable at six annas in a rupee, the total amount of the tax on them being thus Rs. 1,46,551. In the hands of the companies, the total super-tax payable by all of them combined on these amounts would be Rs. 11,925 only.

6. The four companies referred to in para. 4 above belong entirely to the assessee himself without any doubt as can be seen from the following details regarding

the number of shares issued by each of them and the number of shares held by the assessee :—

Name of Companies.	No. of shares issued.	No. of shares held by the assessee.
1. Petit Limited ..	3,48,604 Ord. 3 Pre.	3,48,604 Ord.
2. The Bombay Investment Co., Ltd. ..	3,45,704 Ord. 3 Pre.	3,45,704 ..
3. The Miscellaneous Investment Co., Ltd. ..	3,27,204 Ord. 3 Pre.	3,27,204 ..
4. The Safe Securities Co., Ltd. ..	4,06,164 Ord. 3 Pre.	4,06,164 ..

Each share was of the nominal value of Rs. 10 and the assessee held all of them excepting 3 Preference shares in each case. Out of the subscribed capital of over 30 to 40 lakhs of each company, shares of the face value of Rs. 30 were alone not in his name. They were, however, in the names of his employees who were merely his nominees totally under his control.

7. All the shares and securities the dividend or interest on which was in dispute, stood in the name of the assessee himself or his nominees as stated above. Though the allegation was that they belonged to the above companies, they were not actually transferred to them. The assessee sought to prove that they belonged to the above companies by putting in in each case, a copy of an agreement entered into by him with each of the above companies, whereby he agreed to sell to each of them the shares or securities standing in his name, in various lots, in return for the allotment of their shares. Thus, taking up company No. 1., The Petit Limited, 498 shares in the Maneckji Petit Manufacturing Company Limited were agreed to be sold to this Company (The Petit Limited), in return for an allotment of its 3,48,600 shares of the face value of Rs. 10 each.

8. The assessee also put in, in each case, a copy of a Declaration of Trust executed by him in favour of each of the Companies wherein it was stated that as it was agreed between him and each of the companies that the shares and securities sold by him were not to be transferred to the companies but were to be allowed to continue in his own name, he agreed to hold them as trustee, hand over the income therefrom to the companies and transfer them to them whenever called upon to do so.

9. The Income-tax Officer was of opinion that the above companies formed by the assessee had in reality no independent existence whatsoever, that they were identical with the assessee himself, that they were created merely to avoid super-tax and that the above documents were of no use as evidence to prove a genuine transfer of ownership as they were executed between one and the same party. As regards the Agreement to sell, the assessee was both the vendor and the purchaser and as regards the Declaration of Trust, he was both the trustee and the beneficiary, being himself the sole owner of the companies concerned and identical with them. For these reasons, the Income-tax Officer regarded the trusts as illusory and attached no importance to them as the shares and securities were not actually transferred to the companies. He therefore treated the income from these sources as part of the assessee's total income and levied super-tax thereon.

10. The assessee contended that the above companies were to be treated as distinct entities and separately taxed, that it was to avoid trouble that actual transfers were not made and that he was holding the shares and securities merely as a trustee for the above companies to whom he was bound to hand over the income received by him merely as a trustee. He was therefore dissatisfied with the Income-tax Officer's assessment and appealed to the Assistant Commissioner.

11. On appeal, it was held that there was not sufficient evidence to prove the actual transfer of ownership as the most important step by which all genuine transfers of ownership were brought about, viz., the actual transfer of the shares and securities to the new owner, was not taken in this case and that the explanation given for the unusual procedure adopted, viz., "the avoidance of trouble" was not satisfactory. The appeal was therefore rejected.

12. The assessee thereupon petitioned to me either to revise the Assistant Commissioner's order or submit a reference to the High Court. In support of his contention he put in copies of the following documents which I submit herewith to your Lordships as he (the assessee) relies on them to prove his contention :—

- (a) Articles of Association of Petit Ltd. (Ex. A).
- (b) Agreement, dated 12-4-1921 between the assessee and Petit Ltd. (Ex. B)
- (c) Declaration of Trust made by the assessee, dated 12-4-1921 (Ex. C).
- (d) Material extracts from the Minute Book of Petit Ltd. (Ex. D).
- (e) Copy Return of the Summary of Share Capital and other particulars of Petit Ltd., filed with the Registrar of Companies on 31-3-1925 (Ex. E).
- (f) Material extracts from the Cash Book of Petit Ltd. (Ex. F).
- (g) Material extracts from the Journal of Petit Ltd. (Ex. G).
- (h) Material extracts from the Ledger of Petit Ltd. (Ex. H).
- (i) Audited Balance Sheet of Petit Ltd., for the year ended 31st December 1924 (Ex. I).

Though there are four companies, the documents pertaining to only one of them viz., the Petit Ltd., have been put in as those for the other companies are exactly of the same nature and whatever conclusions can be drawn from the above documents in the case of the Petit, Ltd., will apply equally to the other three companies too.

13. The arguments put forward before me can be summarised as under :—

(a) The assessee was merely the apparent owner of the shares and securities and not the real owner.

(b) The income from the shares and securities beneficially belonged to the companies and not to the assessee himself who was merely a trustee.

(c) The agreement (Ex. B) and the Declaration of Trust (Ex. C) are enough to prove the ownership of the companies.

(d) It was not necessary actually to transfer the shares and securities to the companies.

(e) As has been decided by the English Courts in the case of *Salomon v. Salomon & Co.*,⁽¹⁾ the companies were separate entities recognised as such by law and therefore their income was to be separately taxed.

(f) The companies were not formed to evade super-tax, but even granting that they were, that was no ground to assess the assessee on what formed the income of the companies which were recognised by law, and

(g) The tax was leviable on the person who was the real owner and to whom the income beneficially belonged.

14. As for various reasons which I have discussed at full length in the paragraphs which follow in which I have given my opinion regarding the questions raised in this reference, I was unable to reduce the tax imposed by the Income-tax Officer, I have thought it advisable to make a reference to Your Lordships as desired by the assessee. The case is of very great importance on account of the very large amount of Government revenue which depends on its decision and deserves the most careful consideration. Hence I have argued it out at some length for which I hope Your Lordships will excuse me.

15. QUESTIONS FOR THE DECISION OF THE HIGH COURT :—The questions on which Your Lordships are requested to favour me with an opinion are as under :—

(1) Whether on the transactions recorded in the documents (Exs. A to I), the interest and dividend income in respect of which the super-tax is levied by the Income-tax Officer, beneficially belongs to the assessee personally so as to render him liable to be assessed in respect thereof.

(2) Whether a regular transfer can alone be the sole convincing proof of the transfer of ownership in this case.

(3) Whether once we have the case of what is known as a one-man company there is to be no further enquiry regarding its real nature and meaning and that in respect of the income appearing in its accounts as received by it, it alone is to be taxed.

(4) Whether on the transactions recorded in the above documents (Exs. A to I), the loans from the private limited companies through the medium of which the assessee has drawn for himself the above income from interest and dividend, form genuine loans, or are merely withdrawals of income disguised as loans.

16. OPINION OF THE COMMISSIONER :—As section 66 (2) requires that I should give my opinion while forwarding the reference to your Lordships, I give it in the following paragraphs :—

17. The super-tax assessment levied by the Income-tax Officer falls under section 55 of the Act which requires super-tax to be levied "on the total income of the previous year" of the assessee. Hence, in this case, we have to ascertain the "total income" of the assessee for the previous year. The words "total income" are defined in the Act in section 2 (15) as under :—

"(15) 'Total income' means the total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in section 16."

Section 16 of the Act runs as under :—

"16. (1) In computing the total income of an assessee, sums exempted under the proviso to sub-section (1) of section 7, the proviso to section 8, sub-section (2) of section 14 and section 15, shall be included.

(2) For the purpose of sub-section (1), any sum mentioned in clause (a) of sub-section (2) of section 14 shall be increased by the amount of income-tax payable by the company in respect of the dividend received."

18. The income under dispute consists of

(1) Interest on securities, and

(2) dividends on shares of joint stock companies.

No. (1) falls under section 8 and No. (2) under section 14 (2) (a) read with section 16. Under section 8, the tax is payable by an assessee "in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company." Under section 14 (2) (a) read with section 16, in calculating the "total income" of an assessee for super-tax purposes, we are to include "any sum which he receives by way of dividend as a shareholder in a company."

19. The securities in question stand in the name of the assessee and the interest thereon is receivable by him. As regards the shares in dispute, the assessee is the shareholder and as such receives the dividends. His argument is that he is merely "the apparent owner" of these shares and securities, that they do not beneficially belong to him, that he is not beneficially entitled to the income therefrom, that the private limited companies formed by him are the real owners and that they alone are beneficially entitled to the income. The nine documents (Exs. A to I) are put in as evidence

to prove his contention. We have therefore to examine these documents and find out who is the apparent and who is the real owner.

20. Taking up first of all Ex. A which is the Memorandum of Association together with the Articles of Association, Your Lordships will see that it contains the usual provisions to be found in such documents regarding the object with which the company has been formed, its constitution, powers, etc. etc. Taking up the Memorandum of Association, Your Lordships will see that though the Memorandum is a very elaborate document describing in 38 sub-paragraphs the supposed activities of the company, all that it has done up-to-date is merely to receive the dividend income and pass it on to the assessee as a loan as can be seen from the documents Exs. F, H and I.

21. The most important part of this Exhibit A is para. 93 on page 22 dealing with the powers of the Governing Director and other Directors. The Governing Director is the assessee himself and is invested absolutely with all powers regarding the management of the Company. He can do anything he likes as the other Directors are to be entirely under his control and are "bound to conform to his directions in regard to the company's business" and to "exercise only such powers as may be specifically conferred on them in writing by the said Governing Director." This is enough to convince any one regarding the real nature of this company. The assessee is the sole master and can do whatever he likes. Though para. 96 (page 24) of the Articles requires that there should be at least two Directors, from Ex. E it will be seen that the assessee is the sole Governing Director and that no other Director has been appointed even for name's sake.

22. Now turning to Exs. B and C, the former is the Agreement to sell the shares referred to therein to the company and the latter is the Declaration of Trust whereby the assessee agrees to hold the shares as a trustee and hand over the dividends thereon to the company and to transfer them to the company whenever required to do so. If the assessee were not virtually the sole shareholder of the company and the sole and absolute Director, were the company doing other business besides receiving on paper with one hand the dividends from the assessee and passing them out again to him with the other as a loan, there would have been some force in these documents. With the state of affairs disclosed by the other Exhibits, these two documents are really of no evidential value.

23. Next is Exhibit D which reveals the same state of affairs. It is an extract from the Minute Book of the company. The only persons present at the meeting of the Board of Directors referred to therein were the assessee himself and the Solicitor for the Company.

24. Exhibit E shows that besides the assessee, the company has no other Director, that out of 3,08,607 shares issued, 7 shares of the nominal value of Rs. 70 were paid in cash, that 3,48,604 shares stand in the name of the assessee himself, that the remaining 3 shares stand in the name of his subordinates, one of them being in the name of the Secretary, Petit Charities, one in the name of a person who is working as the Secretary of the four companies formed by the assessee and the third being in the name of a person who is working as a clerk in these very companies. These three persons are entirely under the control of the assessee and as they possess one share each as against 3,48,604 shares possessed by the assessee, their being the nominal shareholders has absolutely no significance.

25. Turning to Exhibit F, it is merely an extract from the Cash book showing receipt of Rs. 24,900 on 10th September, 1924 on account of dividends on the shares in dispute. Exhibit G is an extract from the journal recording the purchase of the shares in dispute from the assessee in return for the allotment of 34,86,000 shares of the company. There is also an entry on 31st December 1924 charging Rs. 40,549-8-1 on account of interest at 6 per cent. to the assessee on what is styled as his current account with the company which is more fully dealt with below. Exhibit H contains extract from the Ledger. There is first of all the vendor's account which is not of

any importance as it merely records the purchase of the shares in dispute by the allotment of shares of the company. Next comes the account of these purchased shares which are 498 in number and are in the Manockji Petit Mills Co., Ltd. The most important point to note in this account is that Rs. 24,900 which in Exhibit F are shown to have been received on 10th September, 1924 have been credited to this account on 31st December, 1924 and the same amount of Rs. 24,900 is shown as withdrawn therefrom on 10th September, 1924. Now Rs. 24,900 is nothing but the amount of dividend received on 10th September, 1924 as noted in Exhibit F on account of the shares alleged to have been sold. The result of the withdrawal of the dividend amount is that the closing balance of this account remains the same as the opening balance, viz., Rs. 34,86,000 which is the purchase price alleged to have been paid for the shares purchased by the Company in 1921. This account very clearly shows that ever since the alleged sale of the shares took place, not a pie on account of dividend has been allowed to remain in it. Every pie has been withdrawn therefrom so that the closing balance in 1924 is the same as the opening balance in 1921, when this account was first opened. Next comes the account of the assessee himself (his current account with the company) which by itself is sufficient to convince any one of the true nature of this so-called company and what the assessee is doing with it. The account opens with a debit balance of Rs. 6,64,037-11-10. Turning to the Balance Sheet, Ex. I, Your Lordships will at once see that this amount of Rs. 6,64,037-11-10 is composed of Rs. 6,00,000 appearing in the Balance sheet on account of the so-called depreciation and reserve fund of the Company and Rs. 64,037-11-10 on account of the balance of the profit and loss account. Next comes the item of Rs. 24,900 debited to him on 10th September 1924 as received in cash from the company. My Lords, as stated above, from Exhibit F it will be seen that this sum of Rs. 24,900 is nothing but the dividend on the shares alleged to have been sold and received on that very date, viz., 10th September, 1924. The moment the dividend was received, it was thus passed on to the assessee. *It was of course received in the first instance by the assessee himself as the registered shareholder and these entries make it quite clear that he kept it with him, never paid it to the company but merely made entries in the accounts crediting the amount as received and debiting it as paid out as a loan to himself.* Next comes the item of Rs. 40,549-8-1 debited to his account on account of interest on current account. On the credit side there is an item of Rs. 15,383-11-0 on account of expenses. On referring to the Profit and Loss account in Exhibit I, it will be easily seen that this item represents the expenses incurred by the company which are put down as having been paid by the assessee himself. The closing balance in this account of the assessee is Rs. 7,14,103-8-11 which means that the assessee owes to the company this much amount. Turning to the balance sheet in Exhibit I, it will be seen that this very item of Rs. 7,14,103-8-11 represents whatever the company has got besides the purchase price of the shares allotted and Rs. 70 on account of the price of the seven shares of the company allotted in cash. The assets of the company thus consist of the shares purchased for the alleged purchase value of Rs. 34,86,000. These shares are of course not with the company nor transferred to it. They are with the assessee in his name. The Company has besides Rs. 7,14,738-11-0 in cash but this cash excepting Rs. 70 only is not with it. It is all with the assessee himself who is put down as having withdrawn it as a loan. On going through all the past profit and loss accounts and balance sheets of the company since its formation, I find that the dividends received since the company was formed have been always kept by the assessee with himself and only book entries made crediting them to the company and withdrawing them at the same time as loans. The amount of Rs. 7,14,173-8-11 barring Rs. 70 consists of nothing but these dividends plus interest at 6 per cent. charged to the assessee for withdrawing them as loans. The interest has never been paid in cash. It is all a paper entry only. Thus the account of the assessee himself in Exhibit H, and the profits and loss account and the balance sheet Exhibit I, convincingly prove that the dividends on the shares alleged to have been sold have been always kept by the assessee with himself and

never even handed over to the Company. They are kept with himself disguised as loans bearing interest at 6 per cent. which interest too has never been paid. All that the assessee does is to bear the expenses of the company.

26. A man may form himself into a genuine company and there may even be occasions when he might have to draw *bona fide* loans from it. We would in such a case find an actual transfer of shares to the company, actual payment in cash of the dividends to the company, loans made not on the day the dividends were received but occasionally, having no connection whatsoever with the amounts of the dividends, regular payment of interest in cash on the loans together with their payment in a reasonable time. Such state of affairs would lead any one to believe in the *bona fides* of the company and the loan transactions. What do we find in this case? A man sets up a company, becomes its sole and absolute Director with all powers centered in himself alone, sells his shares to it, which, however, he keeps in his own name, receives the dividend thereon himself, keeps the dividend with himself, never parts with a pie out of it, puts down in the company's books the very amount of this dividend as borrowed by him as a loan on the very day it was received, goes on doing this every year ever since the formation of the Company, never pays a pie in cash either on account of the interest on these loans or in repayment thereof, in fact does not allow the Company whose capital is put down as exceeding 34 lakhs of rupees to keep with it even a petty sum of Rs. 100 in cash. What is to be inferred from this? Who will regard the sale of shares as a genuine transaction in a case of this kind? Who can regard the loans as genuine in any sense of the word? That on the 10th September, 1924 the assessee with an income of over Rs. 10,00,000 (including Rs. 3 to 4 lakhs on account of interest on money lent by him) was in need of this very sum of Rs. 24,900 making it necessary for him to borrow it at 6 per cent. and that he was so far not able to pay a pie as interest thereon not to mention the return of the principal sum and that exactly the same state of affairs should recur every year since 1921, i.e., for the past five years, that all along not a rupee on account of the principal sum borrowed or on account of the interest thereon could be repaid by the assessee, passes all belief. In such circumstances, My Lords, I cannot but infer that the agreement to sell Exhibit B and the Declaration of Trust Exhibit C are of no evidential value whatever and that a regular transfer of shares would have perhaps formed some better kind of proof in favour of the assessee. The circumstances of the case are such, My Lords, that I cannot even say that a regular transfer would have formed convincing proof. Even with the transfer, seeing how the dividends have been dealt with, I would not have at all been inclined to decide in favour of the assessee.

27. The above documents (Exhibits A to I) make it quite clear who the apparent owner is and who is the real owner. The real owner is he who has with him the shares and securities in his own name, who takes the income arising therefrom, who keeps it with him and enjoys it. The apparent owner is the company to which not only are the shares not transferred but not a pie ever paid as dividend and which is made to rest content with mere paper entries regarding the receipt of the income never paid to it and loans and interest thereon never to be paid to it.

28. Before concluding this part of the reference dealing with questions 1 and 2, I would add a few words as regards the reasons given on behalf of the assessee for not transferring the shares and securities to the companies. The assessee's Solicitor who argued out the case before the Assistant Commissioner stated as under to explain why the transfer was not made :—

“As it is not necessary to take the trouble of actually transferring these shares and securities to the various companies concerned, this has not been done.”

This can convince no one for the simple reason that in cases of transfer of ownership no one ever dreams of not taking all possible steps to secure his title to the property purchased by him merely to avoid trouble. It is not at all a question of avoiding trouble. It is a question of completing one's title to what he acquires by duly paying for it.

29. For all the above reasons, my answer to question No. 1 is that the documents Exs. A to I leave no doubt that the income in dispute beneficially belongs to the assessee personally, that he enjoys it from the moment it is received and that he is liable to super-tax thereon. As regards question No. (2), my answer is that a regular transfer would have formed a better proof than that furnished by the documents (Exs. A to I) but that it would not have been in any sense convincing proof.

30. Next we take up question (3). The gist of the arguments on behalf of the assessee is that once there is a company, there can be no further enquiry whatsoever regarding its real nature and meaning, if the formalities laid down by the Indian Companies Act are duly undergone. We are then not to question any transaction; we must take dividends never paid as duly paid and withdrawals of income in the shape of loans as merely "loans" from the company even though they are never meant to be repaid and are nothing but a withdrawal of profit. In support of this argument, the English case of *Salomon v. Salomon & Co.* (1) is cited. My task is lightened regarding this as the matter has been already discussed and decided in the English Courts themselves. I beg to invite respectfully the attention of Your Lordships to the following extracts from the judgment of Lord Sterndale, Master of the Rolls, in the case of *Commissioners of Inland Revenue v. Sanson*, (2) decided in 1921 by the Court of Appeal.

"An appeal was made to us by the Solicitor-General and I think also by Mr. Hills, not to lay down the principle that when once you have what I may call a *Salomon v. Salomon* case no further enquiry can be made, and that it never can be possible to make any person liable to taxation in respect of the business of the company. Now I never had the slightest intention of laying down any such principle, and I do not think either of my brothers has any such intention, at any rate I certainly have not. There may, as has been said by Lord Cozens-Hardy, M. R., be a position such that though there is a legal entity within the principle of *Salomon v. Salomon & Co.*, (1) that legal entity may be acting as the agent of an individual and may really be doing his business and not its own at all. Apart from the technical question of agency, it is difficult to see how that could be, but it is conceivable. Therefore the mere fact that the case is one which falls within *Salomon v. Salomon & Co.*, is not of itself conclusive. It goes some considerable way, but it is not conclusive." Scrutton, L.J., in the course of his judgment in the same case stated, "In the *Gramophone Case* (3) Lord Cozens-Hardy, M.R., said that there might be circumstances and arrangements which would make a business carried on by a company the business of an individual by virtue of the arrangements and by virtue of his control."

The above judgments were delivered in a case which resembled very much the present case. It was the case of a man forming himself into private companies, becoming their Governing Director and drawing loans therefrom. The genuineness of the loans was questioned by the Crown on whose behalf it was contended that they formed withdrawals of income liable to super-tax. The above extracts will therefore apply word for word to the present case before Your Lordships. The English Courts do hold that even in a *Salomon v. Salomon* case, enquiries can be made to see whether the circumstances and the arrangements in a particular case are not such as to lead one to infer that the business, though carried on by a company, is in reality that of an individual by virtue of the control exercised by him and the arrangements made by him. The absolute control without any responsibility to any one which in the present case is left to the assessee under para. 93 of the Articles of Association and the arrangements made by him to keep the shares in his own name, receive and keep the dividends thereon himself and merely make paper entries in the company's books to give rise to an impression that he has taken loans only from the company, will all show that such a case was exactly the one which was contemplated when the above judgments were passed.

(1) (1897) A. C. 22.

(2) (1921) 2 K. B. 492; 8 T. C. 20.

(3) (1908) 2 K. B. 89; 5 T. C. 358.

31. My answer, therefore, to question No. (3) is, in the words of Lord Cozens-Hardy, M.R., that there might be circumstances and arrangements which would make the business carried on by a company, the business of an individual by virtue of the arrangements made and by virtue of his control and that its income may be in reality the income of an individual who may be liable to super-tax in respect thereof as in the present case.

32. Now taking up question (4), My Lords, its consideration is necessary as, even in case we hold that this is a genuine company and that the shares in dispute have been duly sold to it as per Exhibits B and C, if we come to the conclusion that the loans through the medium of which the dividend income has been withdrawn by the assessee are not genuine loans but mere withdrawals of the dividends themselves, the assessee will still be liable to super-tax. In the English Courts, in such cases, the question whether the loans are genuine or not is always considered and if they are found to be not genuine but merely withdrawals of profit, super-tax is ordered to be levied thereon. Thus in the case of *Commissioners of Inland Revenue v. Sansom* (1), quoted above, the point was considered. The Commissioners, however, held that the loans were genuine and therefore not liable to tax. The Court of Appeal, King's Bench Division, declined to interfere with the above finding of fact of the Commissioners, though Younger, L.J., could not but remark in the course of his judgment as under :—

“The transactions between Mr. Sansom and the Company in relation to these loans are indeed on the face of them very singular. I myself think them more singular if Mr. Sansom is to be regarded as the Managing Director exercising all the powers of the Company, than what would be if he is to be regarded as dealing with the Company's money as his own. For not only is it a remarkable thing that a company should lend its money without interest and without security, but it is an even more remarkable thing that its governing director who exercises all its powers should call upon it to exercise that power of lending in a form so entirely in his own favour.”

33. Very recently there has been decided on 4th June last the case of *Jacobs v. The Commissioners of Inland Revenue* (2) by the Court of Sessions (Scotland) as the Court of Exchequer. That was an exactly parallel case. In it, a man had formed himself into five limited companies and to avoid super-tax drew their profits by way of loans which he had no intention to repay. There were the companies which under the law were legal entities and he posed to be a mere borrower of money from them. As in the present case, he contended that the companies were properly constituted companies, that they were empowered to make loans, that they did make loans to him and that therefore what he received was not income but mere loans. The Special Commissioners, however, held that the loans were not genuine loans and that the man was liable to super-tax thereon as part of his income. The Court of Sessions upheld this finding and so super-tax was levied on these so-called loans. The Lord President in giving his judgment in this case said :—

“My Lords, in this case the question, and the only question put to us is whether the Special Commissioners were entitled to find that the sums withdrawn were part of the appellants' income and as such liable to super-tax. We are not the Judges of Appeal on questions of facts but on questions of law only, and therefore the only question before us is whether the appellant can make out that upon the facts either admitted or proved, the Commissioners could legally, that is to say, could reasonably without being unreasonable, arrive at the finding in fact which is submitted for our consideration.”

In one sense, this question appears to be a mere question of fact to be decided by me finally but in case your Lordships are inclined to follow the practice of the English Courts and wish to consider the question whether “upon the facts, admitted or proved

(1) (1921) 2 K. B. 492 ; 8 T. C. 20.

(2) 4 A. T. C. 543.

the Commissioner could legally, that is to say, could reasonably without being unreasonable, arrive at the finding in fact " that the loans were not genuine, it too is included in this reference. That for the past five years, the loans are made on the very day the dividend is received, that they should equal the amount of the dividend received that very day, that with a magnificent income of over 10 lakhs of rupees there should be necessity on the part of the assessee for such loans, that not a pie should be repaid for so long on account of these loans, that the power to grant loans be exercised by the Governing Director in his own favour and in such a way as to take no action whatsoever for years together for their repayment, that a company should be made to pay away by way of loans all its income for years together and that the loans should be advanced to the very man who is entitled to receive the money represented by them by way of dividends from the company itself are facts which will convince any one that the loans are not at all genuine. They are nothing but withdrawals of the dividend income as soon as it was earned. No doubt the loans are made to bear interest at 6 per cent. but that is merely to give a sort of an outward *bona fide* appearance to the transaction. A closer scrutiny will reveal to one the fact that this is merely going one step further to avoid super-tax. The interest paid on current account to the companies must have been deducted by the assessee from his income from interest on loans and current account which has been declared by him at Rs. 3,25,802. The total deduction on this account for all his four companies would amount to Rs. 1,38,296. If no such payments were made, super-tax at six annas in the rupee would have been payable on this amount as part of his income. By showing them as paid to the companies, they are made liable to super-tax at one anna only at the most and thus Rs. 43,218-8-0 saved on account of super-tax. By this method, the assessee has advanced one step further beyond the practices attempted by English tax-payers to avoid super-tax.

34. For all the above reasons my answer to question (4) is that the loans are not at all genuine. They are mere paper entries to cover the retention by the assessee of the dividends received by him and are therefore liable to super-tax as part of his income.

35. A copy of Your Lordship's Judgment may kindly be certified to me for further action as required by section 66 (5) of the Act.

B. J. Desai with Messrs. *Merwanji Kolha & Co.*, for the assessee.

Kanga, Advocate General, with the Government Solicitors, for the Crown.

JUDGMENT.

MARTEN, C.J.:—For the financial year 1925-26, the assessee Sir Dinshaw Petit has been assessed for super tax on an aggregate income of Rs. 11,35,302 arising in the previous year. Of this sum he objects to Rs. 3,90,804 made up of two sums of Rs. 2,76,800 and Rs. 1,14,004, the former of which arises from Government and other fixed interest-bearing funds, and the latter from dividends in companies. Nothing appears to turn on this distinction, and I shall accordingly ignore it. Admittedly the assessee is the legal owner of most of these funds in the sense that they stand in his name and the interest and dividends are paid to him direct. Admittedly as regards the rest, the apparent legal owners are his nominees, and he receives the interest and dividends. Admittedly he has retained all the above interest and dividends, and applied the same to his own use. But he contends that he is only a trustee for certain family Companies which he has formed, that the interest and dividends are theirs and not his, that he has credited them in account, and that though he has had the benefit of them in specie this is because the family Companies have lent him these moneys at interest which he has credited to them in account, although he has not actually paid the interest in cash. He says that the family Companies are under no obligation to declare a dividend, and are entitled to lend out their income in this way even though it results over a series of years in the fixed preference dividends being unpaid and a large sum representing back income being accumulated in the hands of the assessee.

The Advocate General, on the other hand, contends that the alleged disposition by the assessee in favour of each family Company is a sham, as is also the declaration of trust, that the transactions are all paper transactions and not real, that if the family Company carries on any business, it does so solely as the agent of the assessee, and that in any event the alleged loans are not genuine loans. He consequently claims that the sums in dispute represent taxable income of the assessee under section 2 (15), 3, 6, 12, 55, 56 and 58 of the Indian Income-tax Act, 1922.

In consequence of this dispute, the Commissioner of Income-tax has stated a case for our opinion on the four questions of law submitted in para. 15. Question (4) deals with the genuineness of the alleged loans, but in para. 33 the Commissioner explains the basis on which he has submitted this question, although in one sense it may be said to be a question of fact.

Turning to the facts, it appears that in the year 1921 the assessee formed four private Companies which I will call family Companies for convenience of reference, although in fact no other member of his family took any direct benefit thereunder. The names of these four Companies were Petit Limited; The Bombay Investment Company Limited; The Miscellaneous Investment Limited; and the Safe Securities Limited. Each of these Companies took over a particular block of investments belonging to the assessee. But as the *modus operandi* was substantially the same in each case, it will suffice to follow out the fortunes of Petit Limited.

Taking then Petit Limited as an example, this family Company was incorporated about the 12th April 1921 (see Exhibit D) with a nominal capital of Rs. 10 millions divided ultimately into 9,99,500 ordinary shares of Rs. 10 each and 100 preference shares of Rs. 10 each carrying a fixed cumulative preferential dividend of 6 per cent. Its issued and subscribed capital consists of 3,48,604 fully paid ordinary shares all held by the assessee, and 3 fully paid preference shares held by three persons who are alleged in para. 24 of the case to be his subordinates and to be entirely under his control, the first being the Secretary of the Petit Charities, the second being the Secretary of the four family Companies, and the third being a clerk in the same Companies. Its primary object as set out in clause 3 (1) of its Memorandum of Association was to enter into the agreement of the 12th April 1921, Exhibit B, under which the assessee sold to the family Company 498 shares in Maneckji Petit Manufacturing Company Limited for Rs. 34,86,000 at the rate of Rs. 7,000 per share in consideration of the family Company allotting him 3,48,600 fully paid shares of Rs. 10 each in its capital.

By a contemporaneous Indenture of the 12th April 1921 Exhibit C, the assessee executed a declaration of trust which recited an agreement that the 498 shares should not be transferred until the family Company should call upon the assessee to do so, and that in the meanwhile the assessee and his nominees would hold the 498 shares as agents and trustees of the family Company. The testatum then contained a formal declaration of trust of these shares by the assessee for the family Company and an agreement by him to cause his nominees to make a similar admission. The schedule showed that of these 498 shares, 254 stood in his name and 200 in the name of his wife, and the rest in the names of some 13 other nominees. It is common ground that hitherto no formal transfers have been called for by the family Company. Consequently the formation of the family Company has made no difference to the names in which these 498 shares are held on the register of the Maneckji Petit Manufacturing Company Limited.

As regards the interest and dividends on the 498 shares, admittedly they have been ultimately paid to the assessee throughout. Taking for example the entries of the 10th September 1924 in the books of the family Company itself the cash book Exhibit F shows a receipt of Rs. 24,900 for a half year's dividend which appears at page 18 of the ledger Exhibit H, and is then debited at page 19 to the current account of the assessee. This current account also contains a debit of Rs. 40,549 in respect of interest due by the assessee on the alleged moneys of the family Company as shown in the journal entry Exhibit G. It also shows a total debit balance against the assessee of Rs. 7,14,103 which is included in the balance sheet, Exhibit I. Accordingly on

the assessee's own showing, the family Company has been accumulating all its past income by handing it over to the assessee at interest with the result that by the 31st December 1924 the total had reached Rs. 7,14,103. It has not even paid its preference dividend of in all Rs. 30 per annum on the 3 preference shares held by the three subordinates of the assessee. It, however, purported in its balance sheet Exhibit I to set aside Rs. 6 lacs to a Depreciation and Reserve Fund Account. This, says counsel for the assessee, was a wise provision for a rainy day. And indeed *Burland v. Earle* (1) may be cited as an authority for the proposition that in general a company is entitled to place profits to a depreciation or to a reserve fund, and that dissentient shareholders in the absence of a declaration of dividend or bonus or a winding-up cannot challenge the decision of the majority (see p. 94), provided the powers are exercised *bona fide* (see p. 97).

So much for the accounts. I need not go into them in any greater detail. It suffices to say that the dividends on the 498 shares remained in fact with the assessee from first to last. All the rest represented book entries, which might represent the truth or might not.

As for the family Company itself, its activities were of the most modest description despite the 38 objects mentioned in its Memorandum. Indeed apart from the primary object of entering into the above agreement with the assessee it has done little or nothing except to vary it in an important particular by the declaration of trust, Exhibit C. There has been no additional buying or selling as contemplated by object 2. The 498 shares remain—as they were—in the safe hands of the assessee or his nominees. So does the income also. The Company has been too timid to indulge in any active business. It has been content to be a holding company, and as counsel for the assessee truly points out, there is no general law against that.

Turning to the Articles of Association, they give the assessee complete control as Governing Director (see art. 93); and indeed there is no other Director, for article 96 which prescribes a minimum of 2 Directors only applies if there is no Governing Director (see art. 95). Accordingly under articles 120 and 93 he may exercise all the powers of the Company not required to be done at a general meeting. This would, I think, enable him to lend money under object 4. But dividends have to be declared by a General Meeting (see articles 72, 127 and 128). The fiduciary position of the assessee is to be no bar to the Company being bound by the agreement Exhibit B (see article 4); though having regard to article 95, it is perhaps not clear that article 103 enabling Directors to contract with the Company applies to the assessee. The declaration of trust Exhibit C is not referred to. The audited accounts when approved by a General Meeting are to be conclusive except as regards errors discovered within 3 months. (See article 150).

It is clear, then, that the Company has to act as the assessee wills, provided the terms of the Companies Act are complied with. But here I wish to emphasise the warning which Younger, L.J. (as he then was) gave in *Commissioners of Inland Revenue v. Sansom* (2).

"Now, speaking for myself, I do in the light of these considerations deprecate in connection with what are called one-man companies the too indiscriminate use of such words as simulacrum, sham or cloak—the terms found in this case—or indeed any other term of polite invective. Not only do these companies exist under the sanction, even with the encouragement of the Legislature, but I have no reason whatever to doubt that the great majority of them are as *bona fide* and genuine as in a business sense they are convenient and suitable media for the provision and application of capital to industry. No doubt there are amongst such companies as amongst any other kind of association, black sheep; but in my judgment such terms of reproach as I have alluded to should be strictly reserved for those of them and their directors who are shown to deserve condemnation, and I am quite satisfied that the indiscriminate use of such terms has, not infrequently, led to results, which were unfortunate and unjust, and in my judgment this is no case for their use."

(1) (1902) A.C. 83.

(2) (1921) 2 K.B. 492 at p. 514; 8 T. C. 20.

And then at pages 516-7 the learned Judge says :—

"In my judgment so long as such a company as this was is recognised by the Legislature, there can be no reason why the contracts and the engagements made in its name or entered into on its behalf, and themselves *ex facie* regular, should not everywhere until the contrary is alleged and proved, be regarded as the company's and not those of somebody else, any more than there is any reason why the contracts and engagements and transactions, say even of such a company as the London and North Western Railway Company, should not be regarded as regular until the contrary is shown. To my mind it is strange that it should be necessary to insist upon this aspect of the case at this time of day. But until it is fully realized the loyal adherence to the principles of *Salomon's* case, to say nothing of obedience to the declared policy of the Legislature—which is required of all Courts—will not be forthcoming."

This brings me then to the law on the points in dispute, and I may preface my observations by saying that I have almost been brought up as it were on *Salomon's* case, for when I was a pupil in the Chambers of Mr. R. J. Parker, he with the independence and clarity of thought which afterwards characterised his judgments on the Bench, advised that the decisions first of Mr. Justice Vaughan Williams and afterwards of the Court of Appeal were erroneous in law—a view which was afterwards upheld by the House of Lords. I am therefore not likely to depart now from the principles of *Salomon's* case even though I am in a different land. It is indeed one of the foundations of modern company law, and until one can grasp the true significance of the legal entity thus created by statute, much must remain dim to the understanding of those grappling with the subject.

Let us start then clearly with this that there was here a company duly incorporated under the Indian Companies Act, and that this company was a separate entity from the assessee Sir Dinshaw Petit, just as much as, say, his secretary or any other third party might be. But because there was this separate entity which I will call X, it does not necessarily follow that every alleged transaction between the assessee and X was valid or that it represented a real transaction. We in this country are extremely familiar with the benamidar. Benami transactions abound, for they are employed extensively to hide the truth from inquisitive eyes. For instance in a mofussil appeal last term we had a case of the truth being hidden for over 37 years, the *modus operandi* being for many years a sham mortgage, and later on for even greater security a sham sale to a third party. (See *Patel Dahyabhai Maneklal v. Bai Matu* : First Appeals 316 of 1924 and 251 of 1925 decided on 21st August 1926). In that particular case the motive was to defeat creditors, should a speculative business prove unfortunate. No doubt in many cases the rules of evidence prevent the parties to the instrument from giving oral evidence to show that the document is not what it purports to be. But these rules do not prevent the Crown from enquiring into the truth in the present case, for, in my judgment, section 92 of the Evidence Act does not apply here. (See *Maung Kyin v. Ma Shwe La*⁽¹⁾.)

It is contended by counsel for the assessee that we are bound to accept the agreement Exhibit B, and declaration of trust Exhibit C, of the 12th April 1921 as effecting in law what they purport to effect. In my judgment, that contention is erroneous. Whether the separate entity is a company or an individual matters little or nothing in this respect. With the company just as with the individual you may start with the presumption that a duly executed transfer is a genuine document. But you may yet eventually find on proper evidence that in fact it was an instance of the sham transfer which we are all familiar with in the case of individuals, even though the transaction ends with the formal registration of the document before the Registrar, and the handing over of the purchase consideration in cash in his presence—cash which is conveniently provided by a third party for a few hours or minutes, and which will be restored to him after the conclusion of the ceremony before the Registrar. It

(1) (1917) 45 Cal. 320 ; 44 I. A. 236 at p. 245.

is on a par with funds provided for what is known as "window dressing purposes" in the City of London at the close of a particular financial period. And as regards the point I am now on, I see no vital difference between cash in the shape of coin or notes on the one hand and shares on the other hand. Coin or notes are more easy to manipulate; for coin cannot easily be traced and notes probably will not be in this country. Shares can be traced, but they have this advantage over coin that only a printing press is requisite. And should the transaction be upset, it only means that the shares will never in law have left their slumber as uncalled or nominal capital, or at any rate must be restored to their slumber. There is consequently no risk of any one depriving any of the parties of what does really matter, viz., the coin or notes of the Realm.

But though I hold that it is permissible in law for the Crown to enquire into the genuineness of the transactions between the assessee and the family Company, it would be quite wrong to start with the presumption that those transactions are sham ones. On the contrary one should start with the presumption that they are genuine, and throw the onus on the Crown to prove the contrary. (See Lord Justice Younger's judgment in *Sansom's case*,⁽¹⁾ already cited). We must therefore look closely into the facts of the present case, and then see whether there is evidence sufficient in law to enable the Commissioner to hold—as he did hold—that the Crown had discharged that onus. Or as it might be said in a jury case whether there was in law evidence to go to the Jury, and whether on that evidence a Jury of reasonable men could find that in fact the transactions were sham ones.

Now the main facts here are not disputed. I have already set them out, and need not repeat them. And one striking element is that the Company has never yet obtained sole legal possession and control of the property which it purported to buy. Nor can one point to clear and definite evidence that the Company is carrying on a genuine business as a separate entity. The registered agreement of sale of 12th April 1921 Exhibit B, which was mentioned in the Memorandum and Articles of Association, was an ordinary contract for the sale and purchase of a block of shares. In the natural course of events that contract should have been completed by a formal transfer and delivery of the share certificates, and the subsequent entry of the Company's name as shareholder. [See *Maneckji v. Wadilal*,⁽²⁾] Why then should there be the unregistered document, Exhibit C, of the same date by which the Company was not to get the ordinary rights of a purchaser, and to that extent was not to carry into effect the agreement, Exhibit B, mentioned in clause 3 (1) of the Memorandum? What advantage could the Company get by being content with a declaration of trust by the vendor alone? And if it represented a genuine bargain, why should it be thus concealed from those inspecting the Memorandum or searching the Register? On the other hand, one can clearly see the disadvantages to the Company by the course the alleged transaction took. Substantially the Company could not begin the business contemplated by clauses 3 (2) and (3) of the Memorandum until they *de facto* acquired the shares which constituted their only asset. A law suit might be necessary to force the alleged trustee or his nominees to execute the necessary transfer or to deliver up the share certificates. And there were other risks in thus leaving all their property in the hands of a sole trustee or his nominees, for he and they could have given a good title to any third parties who presumably would be quite ignorant of the alleged but concealed trust. On the evidence before us, the Company has not even got any admission of this trust by the 14 nominees of the assessee set out in the schedules to Exhibits B and C. For all we know, they may not even be aware of it, despite the agreement by the assessee in Exhibit C that he will cause these nominees to admit the trust. It is true that the agreements set out the denoting numbers of the shares. And so the shares may be said to be earmarked as being the Company's property. In this respect the copy agreements in the case stated have made a serious omission. They do not contain the denoting numbers, but I have called for the

(1) (1921) 2 K. B. 492 at p. 516-7; 8 T. C. 20.

(2) (1926) 50 Bom. 360; 53 I.A. 92.

originals, and find that in fact these numbers were inserted. I have also called for and inspected the file of the Company kept by the Registrar of Joint Stock Companies, and I find that although neither of the original documents bears any registration mark, the inference I should otherwise draw from the minute of 12th April 1921, Exhibit D, is correct, viz., that the agreement, Exhibit B, was registered but that the declaration of trust, Exhibit C, was not registered. Should however the Maneckji Petit Manufacturing Company Limited have Articles of Association in a common form giving it a prior lien for advances to any individual shareholder, then it may be that the family Company might be postponed should the assessee or his nominees be indebted to the Maneckji Company.

No substantial argument was advanced to us to explain why the device of this concealed declaration of trust was resorted to. One can hardly accept the excuse given to the Income-tax authorities that it was to save trouble that formal transfers were not executed. If so, why go to the trouble of two documents, Exhibits B and C, instead of one? The real reason may be to preserve the assessee's voting powers in the Maneckji Company. But that is a matter again for his benefit, and not necessarily for the Company's advantage. It would be quite consistent with the transaction being a sham one.

Turning next to the alleged loans of the dividends year by year to the assessee, it appears clear that it is the assessee who receives these dividends in the first instance from the Maneckji Company. There is no suggestion that the Maneckji Company has been instructed to pay those dividends to the family Company. Accordingly the rest is merely a matter of book entries, viz., to credit the cash to the Company and then to transfer it to the debit of the assessee's account. The actual cash which after all is the important thing is kept by the assessee throughout. And one startling circumstance is that beyond the accounts we have nothing in writing whatever to establish the alleged agreement for loan by the family Company. Of the importance of this alleged agreement there can be no doubt. By it the family Company practically bound itself hand and foot to do no business, for its cash immediately on receipt was to be handed back to its vendor and promoter at a fixed rate of interest. And yet there is not even a minute on the subject. And we are asked to infer the agreement from the accounts and the yearly balance-sheets. If, however, this was a genuine agreement, why should it also not see the light of day, or at any rate, find a place in the Company's minute book? And none the less so because the Governing Director with his wide powers was purporting to lend the Company's money to himself.

The result is that we have here a case which is the exact opposite of *Salomon's* case, (1) in the essential facts which I am now considering. There was a genuine and prosperous business in *Salomon's* case, viz., that of a boot and shoe manufacturer (see p. 47). That business was transferred to the limited Company, and there was no question but that thenceforth the limited Company carried on that business. That the Company subsequently fell on evil days was no fault of Mr. Salomon. He tried to save it (p. 49), and Lord Macnaghten expressly negatived any fraud or dishonesty on his part (p. 52). Nor was there any concealment. The creditors were therefore forced to argue that in effect no separate entity was created by the Statute, and that a person holding the bulk of the shares might be held liable as if he was the sole proprietor or a partner. That contention the House of Lords demolished.

So, too, in *Sansom's* case (2) (which I have already cited), there was a genuine timber business carried on by the limited Company, which made large profits during the war. These profits were not distributed in dividend, but were alleged to have been lent to Mr. Sansom the Governing Director who held all the shares but one. The question was whether these loans were genuine. Mr. Sansom himself gave evidence and satisfied the Commissioners he was telling the truth. The Appellate Court confirmed their decision, and pointed out that Mr. Sansom's case was corroborated by the fact that one of the alleged loans had undoubtedly been paid by him

(1) (1897) A. C. 22.

(2). (1921) 2 K. B. 492 ; 8 T. C. 20.

to the family Company. Here we have nothing of that sort. The assessee has not ventured to give any evidence, and the finding of the Commissioner is against the truth of his story. Nor have any of the alleged loans been repaid. If then the Court of Appeal in *Sansom's* case had the present facts before them, I think their judgments show that a different conclusion would have been arrived at. Thus Lord Sterndale, M.R., says at page 501 :—

“ I think it only needs the statement of those facts to show that anybody would approach the matter with a very considerable amount of suspicion, and I think the *prima facie* tendency of anybody's mind would be to say : ‘ This transaction of loans or advances without security and without interest is a mere fiction. It is all nonsense, and the real fact is that Mr. Sansom was receiving under the guise of loans or advances the profits which were made by the company which he controlled and in which he held practically the whole of the shares.’ That, I think, would have been one's impression off-hand. And that no doubt was part of but only a part of the case which was made before the Commissioners. Now the Commissioners have found that these were genuine loans, that they were loans by the company to Mr. Sansom, and that they were not mere pretences to hide the fact that he was receiving the profits of the company. They saw him ; he was examined before them, and I suppose they had before them all Mr. Sansom's and the company's books and all the materials that could be provided. They are business men who I have no doubt have heard of one-man companies and are perfectly familiar with the questions which arise upon them, and they were certainly as well fitted as we are to come to a conclusion of fact in the matter. They did come to that conclusion. I shall allude to the particular terms of their findings later on, but they did come to that finding. It seems to me that for reasons which I shall give this really puts an end to this case, which, in my opinion, depends entirely upon questions of fact.”

And Scrutton, L. J., says at page 506 :—

“ That assessment came before the Commissioners, who had to decide on this point whether these were genuine loans or whether they were merely a disguise for profits of the company received by the shareholder. Now personally I feel that I should have approached the consideration of that question with the strongest presumption that they were really profits and not loans ; the whole thing looks extremely suspicious. But the Commissioners saw Mr. Sansom, they heard him cross-examined, they heard other witnesses, they heard all that could be said on either side, and they heard that in the earlier years of the company a similar loan appeared in the books which had been repaid by Mr. Sansom to the company, and after hearing all the evidence they found that these were genuine loans. Now whatever I might have thought, not having seen the witnesses, I do not see how I can possibly interfere with a finding of the Commissioners, who are judges of fact, and who have seen Mr. Sansom, that these were genuine loans.”

And Younger, L. J., says at page 517 :—

“ I wish, however, to express, if I may be allowed to do so, my fullest concurrence with what has fallen from Scrutton, L.J., and also from the Master of the Rolls on the question in relation to these loans, as it must have presented itself to the Crown before the case came before the Special Commissioners at all. The transactions between Mr. Sansom and the Company in relation to these loans are indeed on the face of them very singular”.

Lord Justice Younger further goes on to point out the singular feature that Mr. Sansom was thus exercising his powers as Governing Director to lend the Company's moneys to himself without interest and without security. The case for our decision presents similar features, except that the alleged loan is said to carry interest.

I next turn to *Jacobs v. Commissioners of Inland Revenue*,⁽¹⁾ which was a case decided in the Court of Session, Scotland, on the 4th June 1925 by the Lord President

(1) (1925) 10 T. C. 1 ; 4 A. T. C. 543.

(Lord Clyde) and Lords Cullen and Sands. There, again, there were genuine businesses, viz., shops carried on by the several Companies in which Mr. Jacobs held substantially all the shares. Here also the profits were alleged to have been lent to Mr. Jacobs. But in this case the Special Commissioners held that the loans were not genuine loans, and the Court of Session upheld his decision. Lord Clyde in the course of his judgment stated as follows :—

“ My Lords, in this case the question, and the only question, put to us is whether the Special Commissioners were entitled to find that the sums withdrawn were part of the appellant's income and as such liable to super-tax. We are not the Judges of appeal on questions of fact but on questions of law only, and therefore the only question before us is whether the appellant can make out that upon the facts, either admitted or proved, which are itemised from page 2 to the end of page 8, the Commissioners could legally—that is to say, could reasonably, without being unreasonable—arrive at the finding in fact which is submitted for our consideration. I confess I can find no ground at all which would justify me in saying that the Commissioners were not entitled to form the conclusion in fact at which they did arrive. I think it is probably true that it would have been better if the last part of that finding had been expressed in the same form as the earlier portions of the finding are expressed, namely, a finding that the loans were not genuine loans but were in point of fact payments drawn from the profits of these Companies by the appellant and formed part of his income. But, after all, that is nothing but a question of form ; it is not one of substance ; I have no doubt at all that on the facts, admitted or proved, there was ample ground upon which the Commissioners could reasonably arrive at the result which they reached, and that is enough for the decision of the only question put to us. I think the question ought to be answered in the affirmative.”

That case seems to me very close to the present one, except that here we have not got a company carrying on an open business like a shop. The circumstances, therefore, are more unfavourable to the assessee.

If, however, the genuineness of the alleged transfer or declaration of trust is once admitted, there is another class of case which is clearly set out in the judgment of Scrutton, L. J., in *Sansom's case*(1) and which raises “ the question whether it can be said that the business which is being carried on by a company is really the business of an individual and consequently the profits made by that company are really his profits, and he is assessable in respect of them”. In the American Brewery cases, for instance, it has been held that the business carried on in America ostensibly by an American Company was really the business of the English Company which held all the shares. [See, for instance, *Apthorpe v. Peter Schoenhofen Brewing Company, Limited*,(2).] On the other hand, in *Kodak Ltd. v. Clark*(3) and in *Gramophone and Typewriter Ltd. v. Stanley* (4), it was held that the profits of the foreign company were not the profits of the English Company, and that the English Company was not carrying on the business of the foreign Company.

I do not propose to go into further details as regards those decisions, nor need I base my decision on them, but I may refer to Lord Justice Scrutton's criticisms when he says at page 509 :—

“ In the *Gramophone Case* Lord Cozens-Hardy, M.R., said that there might be circumstances and arrangements which would make a business carried on by a company the business of an individual by virtue of the arrangements and by virtue of his control. Speaking for myself—I am not at all sure that my brothers take the same view as I do—once you get an independent shareholder in the secondary company it is impossible to say that the business of the secondary company is the business of the man who owns most or nearly all of the shares in that company. The profits do not belong to the man who holds most of the shares ; they belong to the shareholders through the company, and the moment you get Mr. Hime with one share, quarrelsome

(1) (1921) 2 K.B. 492 at p. 507 ; 8 T. C. 20.

(3) (1903) 1 K.B. 505 ; 4 T. C. 549.

(2) (1899) 4 T. C. 41.

(4) (1908) 2 K. B. 89 ; 5 T. C. 358.

and independent, in my view it is impossible to find that the business is the business of the man who owns all the rest of the shares ; it is the business of the man who owns all the rest of the shares and Mr. Hime .”

In the present case, however, the part played by the quarrelsome and independent Mr. Hime in *Sansom's* case falls to the lot of the three subordinates of the assessee. But they can hardly be said to be in the same independent position as Mr. Hime, and there is no suggestion that they are quarrelsome. They have not even been paid their preference dividends, and no protest on their part is on record. Further we have here a feature which is not present in the other cases, viz., that the alleged transfer or declaration of trust is itself challenged.

It was argued for the assessee that in England legislation became necessary to defeat the device of accumulating profits and refusing to declare a dividend (see section 21, Finance Act, 1922) ; and that we are really being asked to do what legislation alone can enable us to do. But that argument does not touch a sham transfer nor a sham loan. And in any event I think it is erroneous in the present case. This is not the first time when plausible paper schemes under the Companies Acts have not stood the test of examination in a Court of law. And even if it should be held that the payment of the moneys to the assessee was illegal without a declaration of dividend, it may yet be that the assessee would be liable for tax as was the case of the book-maker in *Partridge v. Mallandaine*(1), or as regards the illegal abwabs in *Birendra v. Secretary of State*(2). It is, however, unnecessary for me to decide this latter point.

On the other hand, the fact that the family Company has paid tax on the interest credited to it by the assessee in respect of the alleged loans does not necessarily involve the conclusion that the loans were genuine, nor estop the Crown from now showing that these loans were illusory. Paying tax on the alleged interest arising from the loan was much cheaper for the assessee than paying super-tax on the dividends themselves.

Nor do I feel pressed by the case of *Attorney-General v. Duke of Richmond*(3). There the transactions were genuine ones, though their legal effect might be to defeat the Crown's future claims to duty. If the initial transaction had been challenged as here, the case might have been different. Thus Lord Atkinson states at page 475 as follows :—

“ I further think that the case must be determined solely with regard to the legal rights and interest which the respective parties had acquired in October, 1897, the date of execution of the impeached securities. What they did afterwards, how they chose to dispose of those legal interests or to exercise those legal rights, is, in my view, irrelevant. It might have been legitimate to inquire into these matters subsequent, if the transactions which were concluded on that day had been impeached as unreal, colourable, or sham transactions ; but they have been admitted to be real and genuine in their character, and, if so, all the subsequent dealing with the estate and the interest created in it lie outside the field of inquiry, even though by their operation they practically restore the *status quo ante*.”

After giving then my best consideration to the able arguments presented by Counsel, I have arrived at the clear conclusion that there was here in law evidence on which the Commissioner might reasonably find as a fact (1) that there was no genuine transfer or declaration of trust in favour of the family Company, and (2) that the alleged loans were not genuine loans. I would, accordingly, hold on questions 1 and 4 that in law the Commissioner was entitled on the facts to decide question 1 in the affirmative and question 4 that the loans in question were not genuine loans but were merely withdrawals of income disguised as loans.

Questions 2 and 3 should each be answered in the negative.

(1) (1887) 18 Q. B. D. 276 ; 2 T.C. 179.

(2) 1 I. T. C. 67.

(3) (1908) 2 K. B. 729 and (1909) A. C. 466.

Speaking for myself, I would prefer to confine my judgment to the path indicated for the High Court in section 66 (5) of the Indian Income-tax Act, 1922, viz., the decision of the questions of law raised in the case stated by the Commissioner [cf. *Rex v. Bloomsbury Income Tax Commissioners*, (1) and *Jacobs v. Inland Revenue Commissioners* (2)].

But as the Commissioner to some extent invites our opinion on the facts, and as it may be argued that one or other of the questions is a mixed question of law and fact, I may be permitted to add that on the law and the facts, I would answer question 1 in the affirmative, and question 4 by holding that the loans in question were not genuine loans but were merely withdrawals of income disguised as loans. Accordingly, in my judgment, the sums in dispute represented taxable income of the assessee under the Indian Income-tax Act, 1922.

A copy of our judgments should be sent to the Commissioner as provided by section 66 (5). I would order the assessee to pay the costs of this Reference.

KEMP, J. :—This is a reference under section 66 (2) of the Income-tax Act (XI of 1922) and involves the consideration of the legal entity known as a "one-man Company". The assessee is a well known and wealthy citizen of Bombay and the assessment relates to the financial year 1925-26.

The questions submitted for our opinion are set out in paragraph 15 of the reference. It is unnecessary to detail them at length in my judgment.

The assessment relates to super-tax. The Income-tax Officer calculated the petitioner's total income liable to super-tax at Rs. 11,35,102 and assessed the super-tax on it at Rs. 3,20,975-12-0. This sum of Rs. 11,35,102 includes (1) Rs. 2,76,800 interest on securities, i.e., Government paper, Port Trust Bonds, etc., in the assessee's name, and (2) Rs. 1,14,004 dividends on shares in limited Companies in the assessee's name. The Income-tax Officer regarded these as part of the assessee's income. The assessee contends that they are the income of four private limited Companies formed by him and that the Companies are liable to the super-tax on them.

Now super-tax levied on limited liability Companies is at the flat rate of one anna in the Rupee after allowing for the statutory deduction of Rs. 50,000. On individuals super-tax is levied at scale rates of one anna rising to six annas, starting with one anna for the first Rs. 50,000 after allowing for the statutory deduction of Rs. 50,000 and rising by half an anna for each subsequent Rs. 50,000 up to a maximum of six annas. Thus, if the amounts in question be the assessee's private income the super-tax will be Rs. 1,46,551, and if they be the income of the Companies it will be Rs. 11,925 only.

The four limited liability Companies are of the same nature and were formed in the same way. The four Companies are (1) Petit Limited, (2) The Bombay Investment Company Limited, (3) Miscellaneous Investment Company Limited and (4) Safe Securities Company Limited. It will be sufficient for the purposes of the reference to take as a typical case the first Company, Petit Limited. I may here say that out of the total subscribed capital of over 30 to 40 lacs of each Company, only shares of the face value of Rs. 30 were not in the assessee's name. These last were in the names of his employees who are under his control. All the shares and securities stand in the name of the assessee or his nominees but the assessee says that they belong to the Companies.

Taking the case of Petit Limited, it was a company which was registered on the 12th of April 1921 with a capital of 100 lacs divided into 10 lacs of shares of Rs. 10 each. There were 100 preference shares and the remaining 9,99,900 shares were ordinary shares. The issued capital is 3,48,604 ordinary shares and 3 preference shares. The three preference and four ordinary shares were paid for in cash, i.e., Rs. 70. The assessee took up all the other ordinary shares. The three preference shares were

(1) (1915) 3 K. B. 768 at pp. 784-5; 7 T.C. 58.

(2) (1925) 10 T.C. 1; 4 A. T. C. 543.

allotted one to the Secretary, Petit Charities, one to the Secretary of the four Companies and one to the Clerk of the four Companies. The assessee held 498 shares—some in his own name and some in the names of his nominees—of the Maneckji Petit Company of the value of Rs. 7,000 each. By an agreement dated 12th of April 1921 (Exhibit B) the assessee purported to sell these shares to the Company in return for the allotment of the Company's shares, *i.e.*, for 3,48,604 ordinary shares. Then by a declaration of trust (Exhibit C) of the same date in favour of Petit Limited in which it is recited that it was agreed that the shares and securities were not to be transferred until the Company called upon the vendor to do so but that in the meantime the vendor and his nominees should hold the respective shares standing in their respective names as Agents and Trustees for the Company, the vendor stood possessed of the shares upon trust for the Company, and agreed to cause all his nominees to admit that they held the shares in their names as trustees for the Company. No transfers have been called for by the Company. What happened subsequently was this. As soon as the dividend and interest on the shares and securities were received by the assessee a book entry was made in the books of Petit Limited crediting that Company with the amount and on the same day a debit entry was made debiting the assessee with the same amount. In other words the interest never found its way into Petit Limited but when received by the assessee was treated as an advance made to him by the Company. At the date of the last balance sheet a sum of over Rs. 7 lacs is shown as due by the assessee in the books of Petit Limited for these alleged advances and accrued interest. It may be mentioned that no interest was paid in cash but the interest was added to the amount of the loans in the books of Petit Limited. The only cash, therefore, which Petit Limited received, was the Rs. 70 for the 3 preference and 4 ordinary shares.

The Memorandum of Association of the Company contains 38 objects for which it was formed and a perusal of the Articles of Association, especially articles 4, 6, 34 and 93, show that the Governing Director of the Company, *i.e.*, the assessee himself, had a paramount say in the affairs of the company. It was possible for two other ordinary Directors to be nominated by him but, so far as the evidence before us goes, no such Directors have been nominated and in fact the Governing Director, *i.e.*, the assessee, has had the entire control and management of the Company. No remuneration was paid to him as Governing Director (see article 93, clause 4 in this connection). The meeting of the so-called Board to record the Company's registration was attended only by the assessee himself as Governing Director and the Solicitor to the Company.

The Income-tax Commissioner contends that this is not a genuine one-man Company and that the dividends on the shares and securities are really the income of the assessee.

Now this was a one-man Company. It was properly formed and registered as a company under the Indian Companies Act and it had a separate legal entity. There was nothing *prima facie* illegal about it. Younger, L.J. in *Inland Revenue Commissioners v. Sansom*,⁽¹⁾ says :—"Now, speaking for myself, I do in the light of these considerations, deprecate in connection with what are called one-man companies the too indiscriminate use of such words as simulacrum, sham, or cloak—the terms found in this case or indeed any other term of polite invective. Not only do these companies exist under the sanction, even with the encouragement of the Legislature, but I have no reason whatever, to doubt that the great majority of them are as *bona fide* and genuine as in a business sense they are convenient and suitable media for the provision and application of capital to industry." Starting, therefore, with this assumption of a perfectly valid legal entity created by the assessee, we have to consider whether this assumption has been rebutted. It is admitted that the company has paid no dividend and here it may be appropriate to refer to the distinction with reference to super-tax as regards limited liability Companies in England and in India. In England prior to the Act of 1922 limited liability Companies were not liable to

(1) (1921) 2 K. B. 492; 8 T.C. 20.

super-tax. It was found, however, that in some cases they avoided payment of income-tax by omitting to declare a dividend on their profits. Consequently, the Act of 1922 was passed in England which enabled the revenue authorities to declare what should have been a proper dividend for the Company to have declared for the purposes of assessment of income tax. Here in India, as I have already pointed out, limited liability Companies are liable to super-tax but at a rate which is very much less than the rate of super-tax on the income of individuals. It is, therefore, obvious that it was to the assessee's interest that the dividends and shares should be considered as belonging to the Company rather than to himself. The well-known case of *Salomon v. Salomon and Co.*(1) shows that where there is a genuine transfer by an individual of his business to a limited liability Company consisting even of himself and his family so long as the business carried by the company is its business and is really not the business carried on by the individual himself and the requirements of the Companies Act have been complied with, the individual is not liable to indemnify the Company against the claims of its creditors. Nevertheless as stated by the Lord Justices in the case of *Inland Revenue Commissioners v. Sansom* above referred to, one naturally approaches a company formed in the circumstances in which a company in that case was formed with suspicion. In that case, however, the learned Lord Justices held that the Company was a genuine Company and they gave effect to the finding of the Commissioners that the moneys received by Sansom were really loans from the Company and not mere pretences to hide the fact that the assessee is himself receiving the profits of the Company. I take it that from the observations of the Lord Justices in that case one may properly infer that had the moneys received by Sansom not been found by the Commissioners to be loans, they would have held that the assessee Sansom was assessable to income-tax in respect of them. Otherwise with what object did the Lord Justices go into the question of the genuineness of the Company formed by Sansom? In that case also Scrutton, L. J., discusses the question which he says has been fought backwards and forwards in various shapes ever since he has known anything about income-tax law between the skilled counsel for the Crown and skilled counsel who protect the interests of the tax-payer and the question he refers to is, "whether it can be said that the business which is being carried on by a company is really the business of an individual and consequently the profits made by that company are really his profits and he is assessable in respect of them." Similarly, in what are known as the American brewery cases, *Apthorpe v. The Peter Schoenhofen Brewing Co. Ltd.* (2), *The St. Louis Breweries v. Apthorpe* (3) and *The United States Brewing Co. v. Apthorpe* (4), the Commissioners found as a fact in each case that the head and seat of the government of the American Company were in England, and that the business carried on in America was the business of the English Company. I think it is clear, therefore, that apart from the effect to be given to a finding of the Commissioners the Court is entitled to go into the question as to whether the so-called one-man Company is really a business carried on by the assessee himself for the purposes of avoiding payment of tax. In the *Gramophone Company v. Stanley* (5), the Court held that the mere fact that one company holds all the shares in another does not necessarily make the second company the business of the first. And the same would be the case where an individual held all the shares in a company. At page 104 of the report Buckley, L.J. lays down what it is essential for the Attorney-General to prove to succeed in such a case. In the Scotch case of *Jacobs v. Commissioners of Inland Revenue* (6) the Lord President pointed out the effect to be given to a finding of fact by the Commissioners that the sums withdrawn by the appellant were part of his income.

In the present case the Commissioner has found that the sums alleged to have been advanced by the Company as loans were part of the assessee's income but quite apart from the question of what weight should be given to such a finding, I am of

(1) (1897) A. C. 22.

(2) 4 Tax Cas. 41.

(3) 1 Tax Cas. 7.

(4) 4 Tax Cas. 17.

(5) (1908) 2 K. B. 89; 5 T.C. 358.

(6) 10 T.C. 1; 4 A.T.C. 543.

opinion on an application of the principles laid down in the cases I have cited that Petit Ltd. was not a genuine Company at all but merely the assessee himself disguised under the legal entity of a limited liability Company.

I have already referred to the control which the assessee in this case exercised under the articles of Association and as the holder of all the issued ordinary shares in this Company. The three preference shares were held by his nominees and employees. This is not a case where an independent person was the owner of even one share when it might be contended on the opinion of Lord Justice Scrutton in *Sanson's* case that the business would not necessarily be the business of the man who owns all the rest of the shares. A perusal of the current account in the Company's books shows that the dividends and interest alleged to have been received by the Company were credited in the limited share account of the Company and the same day debited to the assessee by way of loan. As I have pointed out none of the dividends or interest ever reached the Company. Only credit and debit entries were made. Nor was any interest paid on the amount of the loan standing to the assessee's debit in the books of the Company but the interest was credited every year to the Company in the account. Here I may properly deal with the contention that because the income-tax authorities have hitherto treated the dividends and interest as part of the income of the Company, they are now estopped from contending otherwise. In my opinion, they are not barred from claiming on an investigation of the true facts of the case that the profits of the Company are really the income of the assessee liable to super-tax.

There are other facts which suggest that the Company in this case was formed by the assessee purely and simply as a means of avoiding super-tax and that the Company was nothing more than the assessee himself. It did no business but was created purely and simply as a legal entity to ostensibly receive the dividends and interest and hand them over to the assessee as pretended loans. In the balance sheet as at 31st December 1924 the amount set down for depreciation and the balance on profit and loss account make up the balance standing to the debit of the assessee in his current account on 1st January 1924. The expenses in the Company's Profit and Loss account Rs. 15,383-11-0 are debited to the assessee's current account with the Company. The whole of the dividends and interest on the shares and securities ostensibly supposed to belong to the Company have been from year to year received by the assessee and merely credit and debit entries made in the Company's books to support the case of a series of loans made every year to the assessee. The assessee's current account with the Company shows the large amount of Rs. 7,14,103-8-11 due by him for these alleged loans and interest on them. Nothing has been repaid on this account, and in this connection it may be observed that in *Sanson's* case the Courts found that some of the earlier loans had been repaid.

The only cash with the Company is Rs. 70 made up of the amount paid for the three preference and four ordinary shares.

The shares and securities stand in the assessee's name. The agreement dated 12th April 1921 between the assessee and Petit Limited provided for the purchase of the shares by the allotment of 3,48,600 fully paid up shares. The Indenture of Trust recites that it has been agreed that the shares shall not be transferred until the Company calls upon the vendor so to do and then proceeds to declare that the vendor shall stand possessed of shares in the Company. As a matter of fact the Company has not called on the vendor to transfer the shares. I agree that one may look at this case from a consideration of the question whether there has been any real trust or not, but I think the shares being in the assessee's name and the dividends having been received by him, it lies on him to show in the first instance that as a matter of fact he really holds them for a Company and not on his own behalf. In other words, he must show he is a trustee for the Company. I think he has not only failed to show this but the evidence establishes that as a matter of fact he really held the shares on his own behalf and for his own benefit, whilst professing to hold them as trustee for a genuine and *bona fide* Company.

The Company has declared no dividends. The Memorandum of Association of the Company contains 38 objects ; yet the Company's activities have been restricted to the supposed receipt of the dividends and interest on the shares and securities supposed to belong to it ; and for 6 years the Company has only received the dividend and interest by paper entries and passed it on to the assessee by way of a supposed loan. So far as the alleged loan itself is concerned, no resolution of the Company has been produced to show that it was sanctioned or the rate of interest which was to be charged. It was made without security and no vouchers have been taken for the advances.

Counsel for the assessee has referred to the case of *Attorney-General v. Duke of Richmond*(1) but that case is distinguishable from the present one. There the object was to bar the entail and the Duke did create an effective arrangement although incidentally it had the effect of escaping the death duty. Later, the fee simple was charged but the transaction was not a fictitious one in the opinion of the majority of the House.

I am, therefore, of opinion that in this case the assessee was receiving under the guise of loans or advances the profits which were made by the Company which he controlled and in which he held all the shares except three which were held by his subordinates. The Company was created by him merely, so that he could make entries in the Company's books suggesting that it received the interest and dividends and paid them as loans whilst in reality the receipt of dividends and interest, if it could be called the business of the Company, was its only business and was in fact the business of the assessee himself.

This really disposes of the argument put forward by counsel for the assessee that if these moneys received by his client were not loans they were moneys wrongfully received by him which he is bound to refund to the Company and on which, therefore, he is not assessable to super-tax. I am not prepared, in any case, to accede to this argument where, if the Company be regarded as carrying on its own business separate to that of the assessee, it has made no attempt and apparently does not intend to recover such sums from the assessee.

Nor can the moneys received by the assessee be regarded as dividends paid by the Company on its shares ; for the Company paid no dividends and the moneys are not entered in its books as such.

I would answer the questions

1. In the affirmative.
2. No.
3. No.
4. They were not genuine loans but merely withdrawals of income disguised as loans.

The assessee to pay costs of Reference taxed as on Original Side and by Taxing Officer.

Per Curiam.—The judgment of the Court will be : Answer Question 1 in the affirmative ; Questions 2 and 3 in the negative ; and Question 4 by holding that the loans in question were not genuine loans but merely withdrawals of income disguised as loans. The assessee is to pay the costs of this Reference to be taxed as on the Original Side, such costs to be taxed by the Taxing Officer.

The Solicitors to both parties are to explain how the copy agreements Exhibits B and C in the case stated came to omit any reference to the denoting numbers of the Maneckji shares, and to correct the copies in the case stated at their own expense.

(1) (1908) 2 K.B. 729 at p. 742.

[168] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Mr. Justice Cuming and Mr. Justice Page.

[2nd June 1926.]

Kumar Sarat Kumar Roy

... Assessee*

The Commissioner of Income-tax, Bengal.

Income-tax Act (XI of 1922), Secs. 33 & (66) (2) & (3)—Review proceedings before Commissioner—Prayer for reference dismissed as time barred—Application to High Court under Sec. 66 (3)—Maintainability—Reference in review proceedings.

The assessee applied to the Commissioner of Income-tax under Sec. 33 of the Income-tax Act to review an appellate order passed by the Assistant Commissioner and in the alternative prayed for a reference to the High Court. The Commissioner rejected the prayer for reference as time barred and also refused to interfere in review. On an application by the assessee to the High Court under Sec. 66 (3) of the Act,

Held, that the application to the Commissioner being admittedly time barred, the Commissioner could not be directed to state a case under Sec. 66 (3) which is limited to cases of refusal on the ground that no question of law arose.

Obiter. In respect of proceedings under Sec. 33 of the Act, the Income-tax Act makes no provision for compelling the Commissioner to state a case. Possibly in a properly constituted proceeding under Sec. 45 of the Specific Relief Act, the Court might in its discretion order him to refer a question of law arising in the course of such proceedings.

Application [Civil Rule No. 246 of 1926] made under section 66 (3) of the Income-tax Act, XI of 1922, for an order directing the Commissioner of Income-tax, Bengal, in Cases Nos. 84 and 21 of 1925-26, to state a case for decision by the High Court.

Rupendra Kumar Mitter, Dharma Das Sett and Paramanand Lahiri, for the assessee.

Pankridge and Satindra Nath Mukerji, for the Crown.

JUDGMENT.

CUMING, J.:—This is a rule on the Commissioner of Income-tax, Bengal, to show cause why he should not state a case for the opinion of the Court.

The facts appear to be these.

The applicant filed certain returns relating to his income with a view to assessment of income-tax before the Income-tax Officer at Rajshahi. That Officer finally made an assessment. This was objected to by the assessee and he appealed to the Assistant Commissioner. The appeal was decided on the 18th September 1925. On the 9th December the applicant filed an application for review under section 33 of the Income-tax Act. He also prayed in the alternative that the Commissioner would refer certain points of law to the High Court. The Commissioner rejected the application so far as it regarded the prayer for a reference of the case to the High Court on the ground that it was time barred. He, however, appears to have considered the case and refused to interfere in review. Mr. Rupendra Mitra who has placed the case before us with his usual clearness and fairness does not press the point that the application to the Commissioner to refer the case was not time barred. He, however, contends that the proceedings before the Commissioner in review under section 33 were proceedings in connection with an assessment, that a serious point of law arose in that proceeding and that hence the Commissioner was bound to refer it to the High Court. He contends that the word "may" in section 66 (1) must be read as "must" and hence that the Commissioner had no alternative but to refer the matter to this Court. In support of his contention he relies on the case of *Alcock Ashdown and Company v. The Chief Revenue Authority of Bombay*⁽¹⁾. No doubt in dealing with that case the Privy Council held that supposing there is a serious point of law to be considered, there does lie a duty upon the Chief Revenue Authority to state a case for the opinion

* 30 C. W. N. 831; A. I. R. 1926 Cal. 998; 96 Ind. Cas. 702

(1) 1 I. T. C. 221.

of the Court and that if he did not appreciate that there is such a serious point it is in the power of the Court to control him and order him to state a case. It may be noted here that this decision was under section 51 of the old Act.

The present section is section 66 which materially differs from section 51 of the old Act. There was no provision in the old Act under which the Commissioner could be called on to state a case.

In section 66 (3) there is a specific provision that if the Commissioner refuse to state a case when called on to do so the Court may require him to do so.

So far however as regards the refusal of the Commissioner to state a case is concerned this application to him to do so was refused on the ground that it was time barred. It has not been contended here that it was not so time barred.

Therefore so far as the provisions of section 66 (3) are concerned we think the Income-tax Commissioner was right in refusing to state a case and we cannot interfere.

If he refused to state a case on the ground it was time barred—and admittedly it is time barred—the Court would have no reason to interfere; for section 66 (3) is limited to cases where the Commissioner refuses to state a case on the ground that no point of law arose.

With regard to Mr. Mitra's contention that as in the proceedings in review before the Commissioner a serious point of law arose he was bound to refer it to the Court, the answer is that possibly in a properly constituted application under section 45 of the Specific Relief Act the Court might order the Commissioner "to state a case." No such application is before us and the Income-tax Act itself makes no provision by which in such a case we could compel the Commissioner to state a case. The case of *Alcock Ashdown & Company v. Chief Revenue Authority, Bombay*⁽²⁾ arose on an application under section 45 of the Specific Relief Act. There is no such application before us, the present application being under section 66 of the Income-tax Act. The result is that the rule must be discharged with costs 4 mohurs.

PAGE, J. :—I agree that the Rule should be discharged, and that the present case is free from difficulty. But as some wider questions of principle were canvassed before us it is desirable, I think, that attention should be drawn to the present state of the law in respect of appeals from assessments to income-tax. In England an assessee who is aggrieved by the determination of the Commissioner as being erroneous on a point of law is entitled to require the Commissioner to state a case for the opinion of the High Court and from the decision of the High Court an appeal lies to the Court of Appeal, and thence to the House of Lords. In India, however, as appears from certain recent decisions, *Tata Iron and Steel Co. v. The Chief Revenue Authority, Bombay*⁽¹⁾, *Alcock Ashdown and Co. v. The Chief Revenue Authority, Bombay*⁽²⁾, *Emperor v. Probhat Chandra Barua*⁽³⁾ and *Probhat Chandra Barua v. Emperor*,⁽⁴⁾ an assessee is in a much less favourable position. In certain specified circumstances, no doubt, he may require the Commissioner of Income-tax to refer a question of law to the High Court under section 66 (2) of the Income-tax Act, and if the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court for an order compelling the Commissioner to state a case. As the law stands at present, however, there is no way in which an assessee is able to challenge the decision which the High Court has given on a reference. In this Court it is the practice that income-tax references are normally heard by a Division Bench of two Judges. But there is no provision in the Income-tax Act or elsewhere to prevent such reference being heard by a single Judge. Indeed, if two Judges who compose the Bench differ in opinion, under the provisions of clause 36 of the Letters Patent upon which recently I had occasion to animadvert in *Profulla Kamini Roy v. Bhabani Nath Roy*⁽⁵⁾, the judgment of the Senior Judge is taken to be the decision of the High Court. And yet there is no appeal from the decision of

(1) 1 I. T. C. 206.

(2) 1 I. T. C. 221.

(3) 1 I. T. C. 284.

(4) 1 I. T. C. 414.

(5) (1925) 1. L. R. 52 Cal. 1018.

the Division Bench either to the High Court under the Letters Patent, or to the Judicial Committee of the Privy Council. Indeed, the learned Standing Counsel went to the length of contending that if the Commissioner refuses to state a case on any ground other than that no question of law arises out of the orders specified in section 66 (2), the High Court has no jurisdiction to entertain an application for an order compelling the Commissioner to state a case. In that event the assessee will be utterly powerless to challenge the correctness of the assessment which the Revenue Authorities have made upon him. It is unnecessary for us in the present case to determine whether this contention of the learned Standing Counsel is well founded or not. But it is not inopportune that the conditions which in India limit the right of appeal from an assessment of income-tax, as disclosed in the recent decisions to which I have referred, should be understood and appreciated.

In the present case the assessee obtained a rule calling upon the Commissioner of Income-tax to show cause why he should not be ordered to refer the question of law arising out of an order passed by the Assistant Commissioner under section 31 on the 18th September, 1925. The Court is moved to exercise the powers vested in it under section 66 (3) of the Income-tax Act (Act XI of 1922). The application of the assessee to the Commissioner to state a case referring to the High Court the question of law was not preferred until the 9th December, 1925 and, therefore, was time barred. It appears, however, that on the same date and in the same document the assessee also applied to the Commissioner for a review of the said order of the 18th September, 1925 under section 33 of the Act. The Commissioner appears to have reviewed the order under section 33. But he has failed to state a case referring to the High Court the question of law that arose therein, namely, whether income derived from certain sources which had been taken into account at the time of the Permanent Settlement was assessable to income-tax. Now, it may well be, though in this case it is not necessary to decide, that in a proceeding duly instituted under the Specific Relief Act the Court in its discretion might order the Commissioner to refer to the High Court this question of law which admittedly arose in the course of the review proceedings [*Alcock Ashdown and Co. v. Chief Revenue Authority, Bombay* (1)]. But, in my opinion, the Court has no jurisdiction to pass such an order in the present Rule which has been passed upon section 66 (3) of the Income-tax Act.

The Rule therefore must be discharged.

Postscript. Since the enactment of section 8 of the Indian Income-tax (Amendment) Act XXIV of 1926, which came into force after the Rule in this case was granted, some of the defects in the Act to which I have adverted have been rectified.

Costs will bear interest at the rate of six per cent. per annum from the date of the judgment of this Court until realisation.

[169] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Foster

[12th July, 1926.]

Maharaja Guru Mahadeo Ashram Prasad Sahi Bahadur .. Assessee.*

v.

The Commissioner of Income-tax, Bihar and Orissa .. Referring Officer.

Income-tax Act (XI of 1922) Sec. 8—Securities deposited with bank to secure overdraft—Interest paid to bank on overdraft—Claim for deduction—Nimaksayar, income from—Assessability.

The assessee obtained an overdraft of about 13 lakhs of rupees upon a deposit of Government and Municipal securities with a bank. The interest on the securities so pledged was realised by the Bank under a general power of attorney from the assessee and credited to his account, while the interest due on the overdraft was debited to that account. Subject to a deduction of the interest paid to the Bank in respect of a portion of the overdraft of about 3 lakhs borrowed for the sole and express purpose of purchasing some of the securities pledged, the income from the securities was assessed.

(1927) I.L.R. 6 Pat. 29 ; A.I.R. (1927) Pat. 133 ; 100 Ind. Cas. 897 ; 8 P.L.T. 359.

(1) 1 I. T. C. 221.

essed to income-tax. The assessee claimed a deduction of the interest paid to the Bank on the entire overdraft amount.

Held, that the income from the securities was part of the assessee's income assessable under Sec. 8 of the Income-tax Act and the overdraft not having been shown to be for the purpose of any business, no allowance was claimable under Sec. 10 of the Act.

On the claim of the assessee that *Nimaksayar*, that is, income from settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre, was exempt from assessment,

Held, that on the finding of the Commissioner that the income was of a recurring nature and not casual, it was in the nature of rent or royalty arising from the produce of the earth and not a sale of a part of the earth and consequently was income assessable under the Act.

Case [Miscellaneous Judicial Case No. 128 of 1925] stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

CASE.

Under section 66 (3) of the Indian Income-tax Act, I have the honour to refer the following questions to the Patna High Court. The questions framed by the Court are :—

“First, whether from the income of the assessee from his securities the amount of interest charged by the Bank on the overdraft of the assessee is deductible for the reason that the Bank holds the securities as a pledge and hypothecation against the overdraft allowed by them under express endorsement in their favour or under a power of attorney and whether this income is governed by section 8 or by section 12 of the Act ; and secondly, whether the income from *Nimaksayar* is not assessable under the law on the grounds that it is the price of the earth sold and is casual and is exempt under the Permanent Settlement Regulations”.

2. The facts of the case are as follows :—

The assessee Maharaja Guru Mahadeo Ashram Prasad Sahi of Hatwa filed a return showing *inter alia* the following income :

Interest on securities including debentures already taxed .. Rs. 1, 59, 523.

Interest on securities of the Government of India or of the local Government that are to be income-tax free .. Rs. 2, 310.

Appended to the return was a detailed statement of the securities which make up these items. The former consists of the Calcutta Port Trust Debentures of 1897 and 1900, Calcutta Municipal Debentures of 1909-10, 1912, and 1913, Government Promissory Notes of 1865, 1900, 1896-97 and 1865, and Indian War loan of 1929-47, and the latter consists of income-tax free 5 Years bond of 1926. At the foot of the statement was the following declaration signed by the assessee himself : “I hereby declare that the securities on which interest as above specified has been received are my own property and were in the possession of the Imperial Bank, Calcutta, at the time when income-tax was deducted.”

So far as these two items are concerned, assessment was made by the Income-tax Officer according to the return ; but I may mention that in review I allowed a deduction of Rs. 19, 644 being the interest on a loan taken for the sole and express purpose of purchasing some of the securities.

The assessee now claims to deduct a further sum of Rs. 82,179 being the interest on an overdraft of nearly 13 lacs granted by the Imperial Bank on security of stocks in question. He states that nearly 5 lacs worth of securities were endorsed in the name of the Bank and that the Bank holds a general power of attorney from him in respect of the rest.

3. It seems convenient to consider first the second part of the first question framed by the Court, namely, whether section 8 or section 12 of the Act applies to the income in question. Section 6 of the Act enumerates 6 heads of income chargeable to income-tax, the 2nd of these being interest on securities. Section 8 describes the head of income more fully and enacts that the tax shall be payable by an assessee

under the head 'interest on securities' in respect of the interest receivable by him on any securities of the Government of India or of local Government, or on debentures, or other securities for money issued by or on behalf of a local authority or company. I submit that there can be no possible doubt that the debentures and other securities under consideration are securities within the meaning of sections 6 (ii) and 8. Now, section 12 enacts that the tax shall be payable by an assessee under the head 'other sources' in respect of income, profits and gains of every kind and from every source to which this Act applies, *if not included under any of the preceding heads*. By the very words of the Act itself, section 12 cannot apply to interest on securities within the meaning of section 8. In my opinion, therefore, the sums in question are chargeable under section 8 and not under section 12.

4. If the income is chargeable, as I contend, under section 8, then under that section the tax shall be payable in respect of the interest *receivable* by the assessee. The assessee argues that the interest is receivable by the Bank and not by him, because some of the securities are endorsed in the Bank's favour and in respect of the rest the Bank holds a general power of attorney from him. I would first refer the Hon'ble Court to the assessee's certificate quoted in paragraph 2 of the statement. He there definitely states that the securities are his own property. In the second place, in my review order of May 29, 1925, I arrived at a definite finding of fact that the interest in question was actually received by the assessee. This finding was arrived at after inspecting the assessee's pass book, voluntarily produced by him which showed that the interest on securities was credited to his account and that account was debited with the interest due from him. So far from the interest not being receivable by him, it was in fact received by him. I submit that under the law the Hon. Court cannot go behind my finding of fact. Moreover, under the law someone is chargeable to income-tax in respect of these securities and if the assessee is not chargeable the Bank must be. But if an attempt were made to charge the Bank it would surely object that the interest was not received by it, as it had credited the assessee's account with the interest.

5. (i) The assessee's return of income showed Rs. 36,057 from other sources which includes Rs 3,107 from *Nimaksayar* which he has given in the detailed explanation of the return. This figure was accepted and assessment was made according to the return. *Nimaksayar* is the income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. This was admitted by the assessee's agent during the hearing of the review. In the statement appended to the return of income for the year 1923-24, *Nimaksayar* is alternatively described as "income from letting out right to collect earth for saltpetre." He thus admitted that it is not the price of earth sold. In a note appended to his return for 1925-26, it is stated that *Nimaksayar* should be exempt from taxation, because "it is a sort of ground rent." The assessee is therefore giving different and irreconcilable descriptions of this source of income in order to evade his liability. I submit that my finding in review that *Nimaksayar* is not the price of earth for saltpetre is a finding of fact supported by the assessee's own statement.

(ii) Nor again is the income casual. It is shown in the return for 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition. A reference is invited to the decision of the Allahabad High Court in *In the matter of Messrs. Chuni Lal Kalyan Das* (1); that decision is to the effect that a receipt is not necessarily casual because it only occurs once, the test is whether the nature of the transaction is non-recurring. I further submit that under section 4 (3) (vii) a receipt is not exempt merely by being casual but must be both casual *and* non-recurring. The assessee's own return showed that this does in fact recur. In my opinion therefore the receipt from *Nimaksayar* is neither casual nor non-recurring.

(iii) As regards the question whether income from *Nimaksayar* is "exempt under the Permanent Settlement Regulation", I submit in the first place that no income is

exempt under the Permanent Settlement Regulations which were passed long before the income-tax law was enacted. I assume that there is an implied reference to the decision of the Patna High Court in *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax, Bihar and Orissa* (1) that non-agricultural income of permanently settled estates is not liable to income-tax if it was included in the assets of the estate at the time of the Permanent Settlement and that the real question is whether income from *Nimaksayar* is governed by that decision. Now, in the first place, the assessee has at no stage of the case either produced any evidence on this point or even applied for any opportunity to do so. The claim that this *sair* is governed by the Permanent Settlement was not made either in the appeal petition or in the application for review. There is thus no evidence whatever in support of the implicit allegation that *Nimaksayar* was included in the assets of the Hathwa Estate at the time of the Permanent Settlement. A reference to the Permanent Settlement Regulation of 1793 further shows that ordinarily only *Jalkar*, *Bankar*, *Falkar* and ground rents of markets were allowed to the Zamindars and all other *sairs* were prohibited. If therefore the present contention had been really before me in review I should have been entitled to find as a fact that income from *Nimaksayar* was not included in the assets of the estate at the time of the Permanent Settlement and that it is therefore liable to be assessed to income-tax.

6. On a point of procedure, I beg respectfully to point out that the Court has directed me to state a case on an alleged point of law that was never raised before me. Section 66 (3) of the Act provides that the High Court may order the Commissioner of Income-tax to state a case when he has previously refused to state one on the ground that no question of law arose. In the present case I did not refuse to state a case on the question whether income from *Nimaksayar* was exempt under the Permanent Settlement Regulations because I was not asked to refer that question. The assessee did not in point of fact definitely frame the question that he wished to be referred; but as he did not even make the claim that is now put forward it is evident that this question of law was not even implicit in his application.

K. P. Jayaswal and H. Prasad, for the assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

DAWSON MILLER, C.J.—This case comes before us under section 66 of the Indian Income-tax Act upon a case stated by the Commissioner of Income-tax. The assessee, the Maharaja Bahadur of Hathwa, complains in respect of two items upon which he has been assessed to income-tax. The first item is the income upon certain Government securities valued at 41 lakhs of rupees which were deposited with the Imperial Bank to secure an overdraft which during the year of assessment has been taken at a sum of close upon 13 lakhs of rupees. The interest payable upon the overdraft amounted to Rs. 82,179. The securities which were lodged with the Bank to secure payment of the interest upon that overdraft brought in an income in the way of dividends of Rs. 1,59,000. These dividends as they fell due were received by the Bank under a general power of attorney granted by the assessee to the Bank. They were credited to his account and from month to month the sums due for interest on the overdraft were in the same way debited to the assessee's account. The assessee contends that this source of income, at all events to the extent of Rs. 82,179, which represents the interest on the overdraft paid to the Bank, should be deducted from his taxable income. The argument put before us in the case is, in the first place, that these securities having been hypothecated to the Bank by way of security for the overdraft are in fact no longer the property of the assessee and ought to be treated as the property of the Bank. The Bank, however, merely has a charge upon the interest of the properties to secure payment of the interest on the overdraft and possibly a charge upon the corpus to secure repayment of the overdraft itself, but the securities

(1) 1 I. T. C. 303.

in no way cease to remain the property of the assessee and the dividends payable on the securities are undoubtedly part of the income of the assessee.

The main argument addressed to us is an argument based really upon the analogy of the deductions which are made in the case of a business where if the business concerned borrows money from the Bank in order to invest it in the business as part of its capital, then the interest payable to the lender upon the sum so borrowed may be deducted from the profits of the business. The principle in such a case is no doubt a sound one, and it has been recognised by the framers of the Income-tax Act but only in the case of income derived from business. Under section 10 of the Income-tax Act the tax is payable under the head "business" in respect of the profits or gains of the business carried on by the assessee, but from such profits or gains certain deductions are allowed in computing the taxable income. One of these deductions is "in respect of capital borrowed for the purpose of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid." It seems to me quite right and proper, and in fact it is the law, that where persons carrying on business have to borrow money for the working capital of their business, that which they have to expend in order to obtain the capital should be deducted from the actual profits which they make; but in the case of a private individual no such considerations necessarily arise. In the present case it cannot be said that the overdraft was in any way obtained for the purpose of carrying on any business or, except to the extent of about 3½ lakhs, for the purpose of investment producing profits which might be considered as income. In fact we do not know for what purpose the overdraft was taken with the exception of the sum named. Apart from that sum of 3½ lakhs it does not appear that any of it was invested. It is noticeable that in the corresponding section which applies to the present case, namely, section 8 of the Act, no such deductions are there mentioned. That section says "The tax shall be payable by an assessee under the head 'interest on securities' in respect of the interest receivable by him on any security of the Government of India or of a Local Government, or on debentures or other securities for money issued by or on behalf of a local authority or a company." Had it been intended that where a private individual borrows money either from his Bank, or from any other source, he should be entitled to deduct the interest thereon from his taxable income I have not the slightest doubt that some provision would have been made to that effect in the Act, but in the other sections of the Act, apart from those dealing with income derived from business, we find no such exemption included. *Prima facie* therefore the assessee is bound to pay income-tax upon all the profits which come under the head of "interest on securities." Section 4 of the Act states in very broad terms what sort of profits or gains are to be taxed. It provides that "Save as hereinafter provided, this Act shall apply to income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing or arising, or received in British India, or deemed under the provisions of this Act to accrue, or arise, or to be received in British India." The income in the present case clearly comes within that section and unless the assessee can show that by some provision in the Act he is entitled to exempt the sum claimed from his taxable income he must, *prima facie*, fail. He is unable in the present case to show any such exemption coming within the Act itself. I have mentioned the fact that a sum of about 3½ lakhs of the overdraft was taken for investment. Those investments form part of the securities deposited with the Bank, and it is interesting to note that the interest on the loan to that extent amounting to Rs. 19,644 has been allowed by the Commissioner as a deduction from the taxable income. This appears to have been done under general instructions from the Central Board of Revenue. Under what provision of the Act it is done has not been discussed, but it seems fair and reasonable that such deductions should be made.

A further point which is of a technical nature was made on behalf of the assessee that the income was not really received by him. It was, however, received by his attorney and received on his account, and although his attorney had a charge upon it for the interest due upon the overdraft, that makes it none the less income received by

the principal. It was received by the agent on behalf of the principal. On this part of the case therefore I consider that the assessee's claim fails.

The other point relates to a sum of Rs. 3,107 which comes under the head of income received from other sources. The actual source from which this income is derived is stated by the Commissioner in the case. It is called *Nimaksayar*, that is, income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre. It appears that earth of this description is found upon the assessee's zemindari. The right to extract that earth is apparently let out to tenants and in return for that right the assessee receives something in the nature of rent or royalty. It was contended that this is merely casual income and non-recurring. That fact, however, seems to be concluded by the findings of the Commissioner. He states in his case that it is not casual income. It is shown in the return for the years 1923-24, 1924-25 and 1925-26. It is thus clearly capable of repetition, and finally he says that, in his opinion, the receipts from *Nimaksayar* are neither casual nor non-recurring. That is a finding of fact and unless that finding of fact was come to by some improper process or by failure to give effect to some rule of law it is binding upon this Court. It has not been shown to us that the facts before the Commissioner were not such as to justify him in coming to that conclusion and, therefore, by his conclusion we are bound.

It was further argued with regard to this part of the case that the income derived from this source is really not income at all, but in the nature of a sale of a part of the earth appertaining to the assessee's zemindari; in other words, that it was a transfer of one kind of capital into another, namely, the transfer of this particular sort of earth into money. It is, however, of a recurring nature and it is not casual and in such cases it seems to me that it is quite impossible to distinguish the rents or royalties, whatever they may be called, arising from this source from the rents or royalties arising from the letting of coal or other minerals in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface, provided that it is not non-recurring or casual, and provided that it is not in the nature of a sale. On this point therefore I think that the assessee's case must fail.

The result is that the decision of the Commissioner of Income-tax must be upheld and this application must be dismissed. The Commissioner is entitled to his costs in this case. The costs ordinarily awarded are Rs. 300, but as the assessee has already deposited a sum of Rs. 100 we think that the costs payable by him should be Rs. 200 in addition to that amount.

FOSTER, J. —I agree.

[170] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

*Before Mr. Justice Pratt, Chief Justice, Mr. Justice Maung Ba and
Mr. Justice Cunliffe.*

[3rd December, 1926.]

A. Eggar

... Assessee.*

v.

The Commissioner of Income-tax, Burma

... Referring Officer.

Income-tax Act (XI of 1922), Secs. 4 (3) (1) & 8—Income from salaries—Creation of charitable trust in respect thereof—Claim of exemption as income of the trust—Trust, if created.

The assessee, a Government servant, was permitted by the Government to accept an appointment under the University of Rangoon on condition that he assigned the whole of the salary he received therefor, to be held in trust for the benefit of the University and its students. In pursuance thereof, the assessee paid each month the salary drawn by him into a separate account and the moneys therein were devoted to the purposes of the University Boat Club. A draft trust deed containing a declaration of the said trust was sent by the assessee for approval but no deed embodying the terms of the trust was executed by him.

* (1927) I.L.R. 4 Rang. 538; A.I.R. (1927) Rang. 95; 100 Ind. Cas. 255.

On an assessment of the emoluments under Sec. 8 of the Act as the personal income of the assessee, it was contended that they were never in fact his income but that they were the income of the trust and as such exempt from assessment.

Held, that though under the circumstances of the case there was a valid trust for charitable purposes, the emoluments not being income derived from property held under trust, were not exempt from assessment under Sec. 4 (3) (1) of the Act.

In re Lachman Das Narain Das of Cawnpore, 1 I. T. C. 378, referred to.

Case [Civil Reference No. 13 of 1926] stated under section 66 (2) of the Income-tax Act, XI of 1922, by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

Statement of Facts and Question referred.—This is a reference under section 66 (2) of the Indian Income-tax Act, 1922, made on the application of Mr. A. Eggar, Barrister-at-Law, who at present holds the appointment of Government Advocate, Burma. The assessment out of which the reference arises is for the official year 1925-26. During the previous year (i.e., the year ended 31st March 1925) Mr. Eggar held the post of Deputy Government Advocate. Mr. Eggar also held during the same year the appointments of Senior Law Lecturer, University College, and Professor of Law, University of Rangoon. For the two latter posts Mr. Eggar received during the year emoluments amounting in all to Rs. 7,299. The sums constituting this total amount of Rs. 7,299 were paid at intervals and at the times of payment the appropriate amounts of income-tax were deducted by the disbursing officer in accordance with the provisions of section 18 (2) of the Indian Income-tax Act, 1922. At the time when his assessment to income-tax for the year 1925-26 was made Mr. Eggar took exception to the inclusion of the sum of Rs. 7,299 which he received as Senior Law Lecturer and Professor of Law in his total income for the purposes of the assessment. Mr. Eggar's objection to these emoluments being included in his private income was that he was bound to hand over these amounts to a trust. The Income-tax Officer having decided against him Mr. Eggar appealed. The Appellate Officer also having decided against him Mr. Eggar has called on me to make a reference under the provisions of section 66 (2). Copies* of (1) the assessment order of the Income-tax Officer, (2) Mr. Eggar's appeal against the assessment, (3) the appellate order of the Assistant Commissioner (Deputy Commissioner of Income-tax), (4) my order in revision, (5) the second appellate order and (6) Mr. Eggar's application to me asking for this reference, are enclosed and are marked I, II, III, IV, V and VI respectively. The question of law now referred arises out of the appellate order marked V. I also attach copies of further correspondence between Mr. Eggar and myself (marked VII, VIII, IX and X) on the subject of the trust deed which Mr. Eggar was understood to have executed.

2. In order to a proper understanding of the question at issue it is necessary to set out the facts relative to Mr. Eggar's appointment as Senior Law Lecturer and Professor of Law and the circumstances in which the alleged trust is said to have been created.

An enclosure to this reference contains copies of the relevant resolutions, notifications, letters, etc. These are designated by capital letters and references to them in the following statement are indicated accordingly.

In December 1922, consequent on the resignation of the late U May Oung, the Governing Body of the University College resolved to offer the appointment of Senior Law Lecturer to Mr. A. Eggar. The Executive Member of the Governing Body of the University College, Rangoon, wrote to Mr. Eggar offering him the Senior Law Lecturership which, he said, presumably carried with it the Professorship of Law. In his letter the Executive Member asked whether, if Mr. Eggar accepted the offer, he would obtain the sanction of the Government of Burma for his holding these appointments in addition to his then official post as Deputy Government Advocate. Accordingly on

* Omitted in the present report.

receipt of this letter Mr. Eggar wrote to the Chief Secretary asking him to obtain the necessary sanction. On 9th January, 1923 the Chief Secretary replied refusing sanction. Thereafter on 17th January 1923 Mr. Eggar again wrote to the Chief Secretary asking that the matter of his acceptance of the post of Senior Law Lecturer might be reviewed in the light of an offer that he should assign the whole of the salary that he should receive from the Law Lecturership and Professorship to the Vice-Chancellor to be held by him on trust and expended for the benefit of the students upon—

(1) the expenses of producing a series of printed lectures on the laws of India and Burma ; and

(2) the encouragement of aquatic sports and the establishment of a boat club for the University.

This proposal was accepted and in a letter, dated 23rd January 1923, the Chief Secretary agreed to Mr. Eggar's accepting the appointments of Law Lecturer and Professor of Law on the conditions set out in his letter. In the closing sentence of this letter the Chief Secretary asked Mr. Eggar to take the necessary steps to put his offer regarding the pay of these two appointments into effect. On receipt of this letter Mr. Eggar wrote to the Principal, University College, informing him of the Government's approval of his taking the two appointments and the condition on which the approval was given. Mr. Eggar attached a draft deed for the approval of the authorities concerned. There having been some delay in making the appointment of Professor of Law there was further correspondence between the Chief Secretary and the Vice-Chancellor of the University. Finally in June 1923 Mr. Eggar was gazetted as Professor of Law.

It appears that each month on drawing the salary attached to the appointments of Law Lecturer and Professor of Law, Mr. Eggar paid these amounts into a separate account and that the monies in question have been devoted to the purposes of the University Boat Club.

Mr. Eggar, however, never executed a trust deed.

Mr. Eggar gave personal receipts on the pay-bills for the amounts in question.

3. The question which I am asked to refer is as follows :—

"Whether the sum of Rs. 7,299 stated in the assessment to be allowances as Professor of Law and Law Lecturer should be included in the personal income of the assessee, or should be treated as the separate income of a trust?"

Opinion of Commissioner of Income-tax. In my opinion the whole of the amount in question was received by Mr. Eggar as salary and, as such, ought to be included in his total income for the purposes of assessment. The College and University authorities unquestionably made the payment to Mr. Eggar as salaries for work done by Mr. Eggar. Indeed the provisions of the Rangoon University Act would not have permitted these sums to be paid otherwise than as salary. It is perfectly clear from the letter of the Vice-Chancellor (K) that the University authorities regarded the proposal to create a trust merely as Mr. Eggar's mode of spending money which he had received as salary.

2. In his petition of appeal Mr. Eggar takes the line that the main charging section of the Act is section 3. He claims that, as the monies in question were not received by him, they do not form part of his income and therefore they are not made chargeable by section 3 ; and that it is illogical to apply the provisions of section 7 to make chargeable income which is not made chargeable by the main charging section. The fallacy underlying the above argument appears to arise from the omission to notice that the provisions of section 3 are "in accordance with and subject to the provisions of this Act." This point was made clear in the case *D. F. Chalmers v. Government* (1). Furthermore, section 3 is not the main charging section in the sense that it defines what classes or kinds of income shall be liable to income-tax. The section which does that is section 4 ; and section 4 (1), owing to the inclusion of

the words "as described or comprised in section 6," links up section 4 with section 6 which, owing to the words "in the manner hereinafter appearing," links up section 6 (and with it section 4) with the whole of Chapter III including section 7. Accordingly the test in the present case is whether Mr. Eggar received the amounts in question as salary. In my opinion it is unquestionable that he did so. Accordingly the amounts in question should be included in his income for the purpose of the assessment.

3. However, it does not appear that in the circumstances of the present reference it is necessary to go into these general questions. Mr. Eggar did not execute a deed embodying the terms of the proposed trust. Section 5 of the Indian Trusts Act, 1882, lays down that to make a valid trust of moveable property it is necessary either (a) to execute a deed and register it, or (b) in the case of a verbal trust to hand over the property to the trustee. In the present case no deed has been executed. Accordingly it is clear that the money comes into the hands of Mr. Eggar *in propria persona* and is not paid to a trust. Even if Mr. Eggar hands over the money to himself as trustee he receives it first *qua* Mr. Eggar.

Davies, for the assessee.

Keith, for the Crown.

JUDGMENT.

MAUNG BA, J.—I have had the advantage of reading the Judgments of the learned Chief Justice and my learned brother Cunliffe.

The facts leading up to this reference made by the Commissioner of Income-tax have been fully set out in their Judgments. The question referred is: Whether the sum of Rs. 7,299 stated in the assessment to be allowances as Professor of Law and Law Lecturer should be included in the personal income of the assessee, or should be treated as the separate income of a trust?

When the Government permitted Mr. Eggar to accept the Law Lecturership and Professorship, which carried an allowance of Rs. 300 each, he most generously agreed to a condition that he should assign the whole of the salary that he should receive from those appointments to the Vice-Chancellor of the Rangoon University to be held by him on trust and expended for the benefit of the students upon (1) the production of a series of printed lectures on the laws of India and Burma and (2) the encouragement of aquatic sports and the establishment of a Boat Club for the University.

To his credit it may be mentioned that Mr. Eggar has carried out the condition of his appointment. The Commissioner of Income-tax in his statement admits that each month on drawing the salary attached to the appointments of Law Lecturer and Professor of Law, Mr. Eggar paid these amounts into a separate account, and that the moneys in question have been devoted to the purposes of the University Boat Club. But the Commissioner was of the opinion that the moneys came into the hands of Mr. Eggar *in propria persona* and was not paid to the trust. For that opinion he gave these reasons: (i) that Mr. Eggar had not executed a deed embodying the terms of the proposed trust; and (ii) that section 5 of the Indian Trusts Act, 1882, lays down that to make a valid trust of moveable property it is necessary either to execute a deed and register it, or in the case of a verbal trust to hand over the property to the trustee.

It is true that Mr. Eggar has not executed a trust deed. He has, however, submitted a draft deed of trust to the Vice-Chancellor but the latter has not had time to examine it. In forwarding a copy of the draft deed to the Principal of the University College Mr. Eggar stated that "the Government have no objection to my taking the appointments of Law Professor and Senior Law Lecturer on the terms that I dedicate my salary in the manner indicated in the draft deed which is forwarded herewith for the approval of the authorities concerned." In that draft we find this: "I declare that all the emoluments to which I may be or become entitled as Professor of Law at the University of Rangoon and Senior Law Lecturer at the University College shall be

held in trust for the benefit of the University and the students, etc." So it seems clear that Mr. Eggar has made a clear declaration of his intention to create a trust and that he has carried out that intention. He has practically divested himself of his rights to the salary in question and has held it in trust for the University. The learned Commissioner of Income-tax has overlooked the saving clause in section 1 of the Indian Trusts Act by which private religious or charitable endowments are exempted from the operation of the Act. Of course the principles laid down in that Act may be accepted for guidance. Under the Act executory trusts may be claimed as obligations in the nature of trusts as provided for in sections 92 and 94 of the Trusts Act. The principle laid down in section 92 is founded on the maxim that equity imputes an intention to fulfil an obligation. Although the salary in question may be treated as trust money, it still remains to be seen whether it can be brought within the exemption laid down in clause 1 of sub-section 3 of section 4 of the Income-tax Act. The clause reads: "Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes etc., etc". The language used is plain. The income to be exempted is the income derived from property held under trust or other legal obligation wholly for religious or charitable purposes. The income in question can in no sense be considered as income from property so held. That being the case, the benefit of this clause cannot be claimed for the income in question. According to that clause, the income derived by investment of the trust money may be brought within its exemption. It therefore seems hard that the trust money itself will not be exempted and unless and until this clause is amended to include such trust property that hardship must continue. The learned Judges of the Allahabad High Court who decided a similar reference by the Commissioner of Income-tax of the United Provinces in *In the matter of Messrs Lachman Das Narain Das* (1), held a similar view. In that case a certain portion of the profits of a registered business firm was allocated to charitable purposes. The learned Judges held that the portion thus allocated could, in no sense, be treated as income derived from property held under trust or legal obligation. So my answer to the question referred will be that the remuneration in question cannot be brought within the exemption of that clause but is taxable as salaries under section 6 of the Income-tax Act.

CUNLIFFE, J.—I concur. In my opinion this assessment should be upheld but on a technical point and a technical point only. In the month of December 1922, the respondent, Mr. Eggar, was occupying the dual position of Assistant Government Advocate and Secretary to the Legislative Assembly. On the 22nd of that month, he received an offer from the Governing Body of University College, Rangoon, to take up the post of Lecturer and Professor of Law at the College. On the same day he applied for sanction to the Chief Secretary for his acceptance for the offer made. On the 9th of January, the Chief Secretary replied regretting that the Home Member was unable to sanction the acceptance as "your appointment is a whole-time one and it is felt that the additional work would be too heavy a tax on your time". On the 17th January 1923, Mr. Eggar again wrote to the Chief Secretary proposing, if sanction could be given to him, to assign the whole of his salary from the lectureship and the professorship (Rs. 600 a month) to the Vice-Chancellor to be held by him on trust and expended for the benefit of the students of the University upon (1) the expenses of producing a series of printed lectures on the Laws of India and Burma, and (2) the encouragement of rowing and aquatic sports and the establishment of a boat club at the University. This altruistic offer appears to have touched a chord. The question of the too heavy tax upon Mr. Eggar's time was waived and the Chief Secretary on the 23rd January replied that there would be no objection on the part of Government to Mr. Eggar's accepting the two positions and he desired Mr. Eggar to take the necessary steps to put his offer regarding the pay of the two appointments into effect. Mr. Eggar then informed the authorities of the University that Government had withdrawn their objection and he was at liberty to take the position on the

(1) 1 I. T. C. 378.

terms laid down. He was duly appointed. Subsequently we find the Chief Secretary writing on behalf of the Home Member to the Vice-Chancellor, Sir Robert Giles, asking whether the conditions approved of had been complied with and Sir Robert replied that Mr. Eggar "has made arrangements for his emoluments in both capacities to be placed in trust for the purpose of defraying the cost of printing his law lectures, etc., and instituting and maintaining a boat club for University students. He is to be one trustee, the Vice-Chancellor the other." Sir Robert added that for the purpose of this trust, Mr. Eggar had drafted a rough Trust Deed, which he, Sir Robert, had not yet had time to look at. He also added "that the Standing Committee approved of Mr. Eggar's proposals to deal with the emoluments, but this Committee is not really concerned with the manner in which the lecturer spends his salary." That, indeed, appears to have been all that ever was done in the matter of establishing a trust; presumably, however, the young Burmans received their preliminary tuition in rowing and aquatic sports and no doubt Mr. Eggar's lectures were printed and available to those who wish to profit by their perusal and study.

On the 3rd May 1926, Mr. Rodriguez, Income-tax Officer, Salaries, assessed Mr. Eggar, who, by this time, had become Government Advocate of the Province, for income-tax and among the items of Mr. Eggar's annual income he included Rs. 7,299 allowances as Professor and Law Lecturer. On the 17th May 1926, Mr. Eggar petitioned against the assessment, alleging that the sum of Rs. 7,299 mentioned above was not part of his annual income, but was the income of a trust for the benefit of the students of Rangoon University. He put forward an appeal against the assessment on the 17th May, in which he elaborated his standpoint on the same lines contained in his petition; and he added that he only accepted the post of Professor and Law Lecturer on the condition that he should receive no income or salary from the University and that the honorarium granted him for the performance of his duties as far as the University was concerned should be held in trust for the benefit of the students. His appeal was disallowed. Mr. Alexander, the Deputy Commissioner, took the view that he had actually received the allowances as remuneration for the services rendered. Mr. Alexander also wrote another order on the subject after his first order had been revised. He came to the same conclusion as before and for very much the same reasons. A reference was then made to the High Court and we have had the benefit of the views of Mr. Mackenzie, the Commissioner of Income-tax, in his Statement of Facts and Question referred to. Mr. Mackenzie also takes up the view that this Rs. 7,299 was Mr. Eggar's salary, that he never executed a deed embodying the terms of the proposed trust and that section 5 of the Indian Trusts Act, 1882, lays down that to make a valid trust of moveable property, it is necessary either (a) to execute a deed and register it, or (b) in the case of a verbal trust to hand over the property to the trustee. Mr. Mackenzie adds that in the present case no deed has been executed and it is accordingly clear to him that the money comes into the hands of Mr. Eggar *in propria persona* and is not paid to a trust. Mr. Mackenzie winds up his opinion by saying: "Even if Mr. Eggar hands over the money to himself as trustee, he receives it first *qua* Mr. Eggar."

Several questions here arise and must be determined before one is able to approach the main question of exemption or non-exemption. The Trust Deed, which is dated January 1923, runs as follows:—"I declare that all the emoluments to which I may be or become entitled as Professor of Law at the University of Rangoon and Senior Law Lecturer at the University College shall be held in trust for the benefit of the University and the students and expended upon (1) printing, typewriting and incidental costs of producing a series of lectures on the Laws of India and Burma and (2) establishing a boat club for the students, purchasing boats and so forth. Power to settle the details of these schemes and the application of the fund, as well as power to cancel this trust, shall be vested in the Vice-Chancellor for the time being of the University and myself subject (where necessary) to the final decision of the Chancellor of the University."

At the hearing Mr. Eggar contended through his learned counsel that effect should be given to his intention on an equitable principle which is laid down in the well-known English Chancery case of *Holroyd v. Marshall*. (1). That case is an authority for the equitable doctrine that on a contract agreeing to make a transfer of property, the beneficial interest in that property is immediately passed to the transferee provided the contract is one of which a Court of Chancery would decree specific performance. I am inclined, however, to think that the principle laid down in *Holroyd v. Marshall* (1) and in the long line of English and Indian cases which have followed its decision, cannot be applied in the present case. The maxim in equity which considers as done that which ought to be done is almost invariably applied to cases in which some default or fraud has taken place for which reason the assistance of the Court is asked. I am much more inclined to regard the whole of this transaction as being nothing more or less than executory trust. The deposit of the draft so-called Trust Deed was in my view in law a direction to create an executory trust. Executory trusts are exceedingly common in the United Kingdom. The directions to create them are usually found in wills and marriage settlements and often covenants to settle after acquired property have been confirmed. Where, too, the creator of the trust nominates himself as a trustee for the *cesti que trust*, the Courts have always looked generously upon the intention of the declaration. It is quite true that covenants to settle usually only affect corpus and not income, but effect has been given where a plain intention is shown to trusts concerned with income alone; for trusts and legal estates are governed by the same rules. It is quite true that a voluntary covenant to create a trust is not enforceable, but if the whole of the circumstances of this case are examined, it will be seen that there was a valid contract between the Government and Mr. Eggar enforceable in law from which this voluntary trust sprang and the true test is whether, on the whole construction of the letters passing between the parties and also of the draft Trust Deed, there was an intention to give third parties immediate equitable rights. In my opinion, that test is fulfilled.

The Commissioner for Income-tax, however, contends that any question of a trust in India is controlled by the provisions of the Indian Trusts Act of 1882. That is quite true if the trust in question does not happen to be a charitable trust. But the preamble to that Act has been interpreted to exclude all charitable trusts from the operation of the statute. I therefore arrive at the next question as to whether this executory trust is in fact a trust for charitable purposes. I think that the arrangement entered into here comes well within the definition of a charitable trust laid down by Lord MacNaughton in *Pemsel's case* (2).

Such being the case, is this charitable executory trust exempted under the Indian Income-tax Act of 1922? Section 4, sub-section (3), sub-paragraph (1) of the Act reads :

"This Act shall not apply to the following classes of income. Income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied or finally set apart for application thereto."

And sub-paragraph (2) of the same sub-section runs :

"Any income of a religious or charitable institution derived from voluntary contributions and applicable solely to religious or charitable purposes."

It is with a good deal of regret that I am unable to hold that Mr. Eggar's gift comes within the ambit of either of these paragraphs. Paragraph (2) obviously does not apply as the income there mentioned is of course the income, once it is in their hands, of the charitable or religious institutions. As to paragraph (1), in my view the trust would fulfil all the requirements laid down were it derived from property. The legal definition of personal property is a very wide one. It has been held to apply to debts, in certain circumstances, to chose in action of all kinds, to copyrights, to

(1) 33 L. J. 193.

(2) (1891) A.C. 531.

patents, to debentures and even to Government annuities, but I cannot think that even this wide interpretation can include the right to a future salary. It is true that Mr. Eggar, having regard to his covenant with the Chief Secretary, received his salary and his position in a fiduciary capacity alone, but as that salary was not income derived from property held on trust he cannot be considered as able to obtain the benefit of the exemption. It is with reluctance, as I have said, that I uphold this assessment. Whether such action on the part of the authorities will encourage similar public-spirited efforts it is not for me to say. I can well imagine, for example, that on different facts the receipt of extra emolument such as this might place the assessee within a different category of assessment, for example, in relation to super-tax. There a real hardship would accrue.

For these reasons, however, I think the assessment should be upheld.

PRATT, C.J.—The Commissioner of Income-tax has under section 66 (2) of the Indian Income-tax Act referred to this Court the question whether the remuneration received by Mr. Eggar for his services as Senior Law Lecturer, University College and Professor of Law, University of Rangoon, should be included in his personal income for purposes of assessment to income-tax.

Mr. Eggar was Deputy Government Advocate and the sanction of the Local Government was required before he could take up the appointments under the University.

The Local Government consented to Mr. Eggar accepting the appointment on the condition that he assigned the whole of the salary received from the Lecturership and Professorship to the Vice-Chancellor to be held by him on trust and expended for the benefit of the students (and of the University) upon (1) the expense of producing a series of printed lectures on the laws of India and Burma and (2) the encouragement of rowing and aquatic sports and the establishment of a boat club for the University.

The Chief Secretary to the Government in his letter stating that there was no objection to Mr. Eggar taking up the posts under the University stated that he was desired to ask him to take the necessary steps to put his offer regarding the pay of the two appointments into effect.

Mr. Eggar accordingly drew up a draft trust deed, but no trust was formally constituted.

The income-tax was deducted in advance from the sum due to Mr. Eggar from the University at the time of payment by the disbursing officer under section 18 (2) of the Income-tax Act. In his appeal against the assessment of his salary as Professor and Law Lecturer as personal income before the Assistant Commissioner of Income-tax Mr. Eggar took the position that the emoluments of his office under the University became the income of a trust from the time that he undertook his duties under the University and were never in fact his income.

Before us it has been argued on behalf of Mr. Eggar that under the circumstances there is a trust and that he received the money as agent of the trust and as trustee thereof himself. From the statement of facts drawn up by the Commissioner of Income-tax it appears that each month, on drawing the salary attached to the appointments of Law Lecturer and Professor of Law, Mr. Eggar paid these amounts into a separate account and that the monies in question have been devoted to the purposes of the University Boat Club.

Under these circumstances it is to my mind clear that the money was the personal income of the assessee and only became trust money, if at all, when paid into the separate account for the purposes of the boat club.

The exemption set forth in sub-section (3) (1) of section 4 of the Act has no application since the emoluments in question are not income derived from property held under trust or other legal obligation wholly for religious or charitable purposes.

Mr. Eggar accepted the office of Law Lecturer and Professor under the condition that he disposed of his salary for the benefit of the University as proposed by him, but it did not cease to be his salary by reason of his accepting the condition.

The position would have been different had he accepted the office on condition that he should draw no salary. It was open to him to accept the appointment without pay, and to leave the University with liberty to devote the emoluments, which would ordinarily be paid to a Lecturer and Professor to charitable purposes, if they thought fit.

He made no such agreement.

He cannot therefore claim as of right exemption from income-tax with respect to a portion of his income, which he devotes to charitable purposes under an agreement with the Local Government, even if he has created a trust with respect thereto.

It does not appear necessary to quote authorities on the point, but I note that a similar view was taken by a Bench of the Allahabad High Court recently *In the matter of Messrs. Lachman Das, Narain Das of Cawnpore.* (1)

It was there held that a dedication by the three active members of the firm of a share of the profits of their business to charitable purposes did not convert that portion of their income into income derived from property held under trust or other obligation wholly for religious or charitable purposes, and that it was not exempt from assessment under clause (3) (1) of section 4 of the Income-tax Act.

My answer to the reference would be that the sum of Rs. 7,299 stated in the assessment to be allowances as Professor of Law and Law Lecturer should be included in the personal income of the assessee.

We are agreed that the reference shall be answered in these terms, but we make no order as to costs.

[171] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and Mr. Justice Cargenven.

[31st August, 1926.]

Ratan Singh

.. Assessee.

v.

The Commissioner of Income-tax, Madras.

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 10 (2) (v), (vi) & (ix)—Renewal of parts of machine—If capital or revenue expenditure—Deductions under Sec. 10—If disjunctive and cumulative.

Per Chief Justice and Beasley, J.—The allowances specified in Sec. 10 of the Income-tax Act must be treated as disjunctive and cumulative and not alternative and exclusive. Consequently Sec. 10 (vi) cannot be construed as extinguishing the right to deductions specifically outlined and defined in the other clauses of the section.

The question whether the substitution and renewal of old and worn out parts of a machine is capital expenditure or current repair is one of degree depending upon the circumstances of each case.

Per Cargenven, J.—The question is one of degree and in other than extreme cases of misapplications of principle is one of fact. The cost of any new parts which substantially change the identity of the machine, effect a substantial improvement or result in a substantial extension of the period of serviceableness, may be said to be capital rather than revenue expenditure.

Case [Referred Case No. 25 of 1925] stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in his letter No. 261 of 1925, dated 12-12-1925 for the decision of the High Court.

This case originally came up as an appeal [O.S.A. 15 of 1925] from the judgment of Mr. Justice Kumaraswami Sastri who refused to direct the Commissioner of Income-tax to state a case to the High Court on the questions raised in the present reference. The judgment of Kumaraswami Sastri, J., is reported as 1 I. T. C. 389. This appeal and another reference by the Commissioner with reference to the same assessee, on the question as to the meaning of "obsolete" in section 10 (2) (vii), were heard and disposed of together. The judgment dealt with the questions argued as if arising in a case stated by the Commissioner. But as there was no case stated under section 66

(1) 11.T.C. 378.

of the Income-tax Act, the Commissioner made a reference under the Income-tax Act. The case so stated came up again before the Chief Justice, Mr. Justice Beasley and Mr. Justice Cargenven. Their Lordships the Chief Justice and Mr. Justice Beasley reaffirmed their opinions already expressed in the judgment in the appeal (O. S. A. 15 of 1925), while Mr. Justice Cargenven stated his opinion separately.

The judgment of their Lordships the Chief Justice and Mr. Justice Beasley in O. S. A. 15 of 1925 is as follows:—

This reference raises two points. The assessee's business is that of an owner of motor-cars plying for hire. Only two points were raised before the learned Judge, though the first was raised under two heads. We propose first to dispose of the second contention.

The assessee was the owner of a new car which very shortly after it was purchased met with an accident and had to be sold as scrap iron, and the learned Judge has held that this entitles him to claim a deduction under section 10 (2) (vii) of the Indian Income-tax Act of 1922 on the footing that this may be treated as having become, in the words of the Act, obsolete. It seems to us that this is contrary to the plain meaning of the language used. Obsolete machinery means machinery which though it is able to perform its function, has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man, instead of continuing to use such machinery, would discard it and install more modern and more labour-saving machines. In our opinion the word obsolete is quite inapplicable to a new car which is only useless for its purposes because it has been broken to pieces in an accident and in our opinion this cannot be allowed as a deduction and we disagree with the learned Judge. [This question was the subject of a distinct reference disposed of separately: See. 2 I. T. C. 107, Ed.]

A much more difficult point is raised with regard to the second matter which relates to certain items which were disallowed by the income tax authorities as being of the nature of capital expenditure which is excluded from deduction by section 10 (2) (ix). That sub-section allows any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits or gains of the business. The latter comes to a total of Rs. 3,296-2-2, and it seems reasonably clear that the first three items were additions to the machinery and plant used by the firm, which can clearly be classed under the head of capital expenditure. The largest item is one of Rs. 1,925, which is described as the cost of an old car purchased from Tirali Srinivasa Aiyangar. The evidence of the assessee about that, which seems to have been accepted, is that he bought the car not to use it as a car but to resolve it into its component elements and use the parts for casual repairs to his existing fleet of cars. The remaining items are for the renewal of various parts of the cars actually engaged in the business of the assessee.

The income-tax authorities rely upon a decision in Scotland under the statutes in vogue at the time, viz., section 12 of the Customs and Inland Revenue Act of 1878, 41 Vic. Chap. 15. That section directs the Commissioners in assessing the profits and gains of a trade to allow such deductions as they may think just and reasonable to represent the diminished value by reason of wear and tear during the year of any machinery or appliances used for the purpose of the concern and belonging to the person or company by whom the concern is carried on. Upon that it was held in the case of *Caledonian Railway Co. v. Banks* (1), decided in the Court of Exchequer in Scotland that the assessee could not deduct the actual expenses of occasional repairs and renewals and then proceed to claim an additional deduction under the general section of the statute for the same thing under the guise of wear and tear. With that decision no one wishes to quarrel; but it is argued for the assessee that the position under the Indian statute is quite different because the section relating to deductions and the sub-section allowing deductions must be taken to be disjunctive

(1) 1 T. C. 487.

and it is not an answer to a claim which clearly falls within the words of any one of the sub-sections to say to the assessee that he must be deemed to have obtained that deduction under some other sub-section. Deductions are allowed such as are material for the decision of this case under section 10 (2) (v), (vi) and (ix). Clause (v) allows a deduction in respect of current repairs to building, machinery, plant or furniture, the deduction permitted being the amount paid on account thereof. It is said in this case that the renewal of parts of a machine cannot be treated as a current repair, but must be treated as a new addition of capital to enable the machine to be kept in proper running order. It is pointed out that by clause (vi) of sub-section (2) a deduction is allowed in respect of depreciation which has been assessed by Government at the not ungenerous figure of 20 per cent. and it is said that the assessee having had the benefit of this large deduction under clause (vi) cannot get the same deduction over again in another form by having recourse to clause (v). In our opinion, if the Legislature meant the various reliefs by way of deductions specified in section 10 of the Act to be alternative and exclusive, they could very easily have said so and in our opinion if any deduction claimed falls within the express words of any one of the sub-sections, it is not open to Government to say that it is really covered by the general provision of sub-section (vi). It is obviously arguable that most of the repairs in this case can be described as current repairs though of course the matter is one of degree. If a carburetter of a motor car ceases to function, we should incline to the view that the renewal of the carburetter in order to enable the car to keep the road is properly described as a running repair. On the other hand, if a car, as a result of an accident, has nothing left but a wheel and everything else had to be renewed, clearly the sensible view would be that the renewal of the car could only be described as an increase of capital. But apart from that, we have the provision of sub-section (2) (ix) which speaks in general terms of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. Without committing ourselves to a view as to what are current repairs within the meaning of clause (v), we think it reasonably clear that the cost of repairs set forth in the list that was handed up to us must be treated as an expenditure incurred for the purpose of earning the profits or gains of the business, and we do not think that it can properly be treated as capital expenditure which is excluded from the operation of clause (ix). If this view be correct, the cost of an old car for the sole purpose of using bits and parts of it for carrying out repairs to cars on the road, which is the main item in the assessee's claim for deductions being nearly two-thirds of the whole, stands on the same footing as if he had obtained and used new parts for repairing his fleet of motor cars from time to time. In this case we feel that the Legislature has done that which is so often done in Indian Acts and that by enumerating too much and trying to cover every possible case, they have *per incuriam* given more than one remedy in respect of what is really one ground of deduction. But until and unless the Act is amended, we think that separate heads of reliefs must be treated as disjunctive and cumulative and hold that the deductions claimed except as regards the first three items, fall within the express words of section 10 (2) (ix) and that the Scottish case is inapplicable in India because the Act which the Scottish case interprets was an Act which only contained deductions for depreciation and did not, like the Indian Act, specify under separate heads other deductions differently described. We do not think it would be right to hold that what I may call the omnibus clause (Clause vi) can be construed as extinguishing the right to deductions which are specifically outlined and defined in other sub-sections of the Act. We feel the result to be unsatisfactory and to be one which gives more to the assessee than was intended or indeed is just; but the fault is that of the draftsman of the Indian Act, who threw into the section the omnibus clause modelled on section 12 of 41 Vic. Chap. 15 without reflecting that such a clause was not wanted in an Act which contained the specific deductions taken from the later English Finance Acts. The result will be that the appeal is allowed with costs. On the reference, there will be judgment for the Commissioner with costs to be fixed at R. 150.

CASE.

As directed by the High Court in order in O.S.A. No. 15 of 1925 under section 66 (3) of the Indian Income-tax Act, I refer the two following questions for the decision of the High Court :

(1) Whether the substitution of new parts in the place of old and worn out ones in a machinery is capital expenditure, or is it in the nature of repairs or revenue expenditure, and

(2) Whether such replacements are not in the nature of working expenses under section 10 (2) (ix) of the Indian Income-tax Act.

2. The order issued to me directs me to refer these two questions with my own opinion thereon "in the light of the observations contained in the judgment herein." This order has placed me in a somewhat difficult position ; for in the judgment enclosed with the order their Lordships have held that the expenditure now under consideration cannot be properly treated as capital expenditure. As however this was not the point which was before their Lordships in deciding the appeal against the decision of the Hon'ble Mr. Justice Kumaraswami Sastri, I believe I am right in considering that the matter is not *res judicata*. I therefore refer the two questions as directed in the order issued to me by the Deputy Registrar, Appellate Side.

3. In my opinion the answer to the two questions propounded is as follows :—

(1) This depends on the extent of the substitution. The matter is one of degree. Every conceivable variety of case can arise from the case on the one hand of a car of which, let us say, only one wheel is left and all the missing parts are supplied (clearly a case of capital expenditure) to the case of a car with a leaking rubber connection—which is replaced—clearly a case of revenue expenditure. It does not seem to be possible to lay down any general legal principles on which the line between capital and revenue expenditure should be drawn, but it seems to me that in this case the Crown is on the right side of the line. The substitutions effected in this case, viz. a new body, a new flywheel, a new radiator, a new carburetter, inner and outer bearings for the front wheel, new wheels, new main bearings and new pistons, were so extensive as to earn revenue for more than one year and prolong the life of the car beyond the period to which it could have been expected to last. The largest item in dispute is the cost of a car purchased from one Tirali Srinivasa Ayyangar. In my opinion that expenditure is of a capital nature as it increased the assets of the business although the assessee subsequently decided to break up the car and use its parts in repairing other cars.

(2) This question seems to be question (1) re-stated and the answer, I think, should be the same. Both questions are questions of degree to be determined in each case and it is hard to see how any law or legal principles can arise in connection with their determination. A question of degree is almost necessarily a question of fact : *Atkin, L.J. in Cooper v. Stubbs*, (1), Mr. Justice Rowlatt in *Cape Brandy Syndicate* case (2).

K. V. Sessa Aiyangar, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

THE CHIEF JUSTICE AND BEASLEY, J.—Treating this as we are, we gather, asked to do, as coming before us now to deal with the reference, we have nothing to add to what we said on the former occasion. That is the result of the best judgment we can apply to this matter. It is quite true that in the course of the argument both sides discussed whether the particular repairs in this case can reasonably be regarded as being capital expenditure or not and on that we doubtless expressed our opinion. It may be right, it may be wrong, but that is our answer reaffirmed to put the thing technically in order.

(1) 10 T. C. 29.

(2) 12 T. C. 358.

CURGENVEN J.—The questions referred by the Commissioner of Income-tax are:—(1) Whether the substitution of new parts in the place of old and worn out ones in the machinery is capital expenditure, or is it in the nature of repairs or revenue expenditure, and, (2) Whether such replacements are not in the nature of working expenses under section 10 (2) (ix) of the Indian Income-tax Act. The answer to both these questions depends upon the primary question, whether the expenditure is in the nature of revenue expenditure. I would say in reply to the first question, that ordinarily the substitution in a machine of new parts for old and worn out parts is in the nature of repairs or revenue expenditure. This is quite evidently true of the substitution, e.g., of new tyres for old and worn out tyres in a motor car. But the statement needs to be qualified in some manner, because it is clear that by successive substitutions, an old motor car might be converted into a new one and that process would really be equivalent to selling the old car and buying the new one, a matter of capital expenditure. The question is really one of degree and it may perhaps be said that the cost of any substitution of new parts which substantially change the identity of the machine, effect a substantial improvement or result in a substantial extension of the period of the serviceableness, would be capital rather than revenue expenditure. But even such tests as these are not absolute, and the question whether any given item of expenditure is of the one or the other kind can only be answered on a consideration of the circumstances, is, in other words and in other than extreme cases of misapplication of principle, a question of fact. The same remark applies, in my view, to expenditure not being in the nature of capital expenditure, which may be allowed for under clause (ix).

[172] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Mr. Justice Greaves.

[20th August, 1926.]

Mitchell and others

.. Plaintiffs.*

v.

McNeill & Co.

.. Defendants.

Income-tax Act (XI of 1922), Secs. 55, 29 and 44—Death of partner in a firm—Super tax assessment on estate of deceased—Payment by the firm—Validity of the assessment on the estate of the deceased partner—Claim by firm for re-imbursement.

After the death of a partner in a firm on the 14th June 1924, an assessment to super-tax for the year 1924—1925 was made on the 20th March 1925 on the estate of the deceased partner *c/o* of the firm under Secs. 55 and 29 of the Income-tax Act. The assessment was made on the income of the deceased partner for the previous year ending 31st March 1924, which income was received by the deceased partner or his estate. The demand in respect of this assessment was made on the firm who on payment of the same claimed repayment from the executors of the estate of the deceased.

Held, that under the Indian Income-tax Act it was not within the competence of the taxing authorities to assess the estate of a deceased to super-tax and consequently the estate of the deceased was under no liability to pay such tax. The payment of the tax by the firm being therefore a voluntary payment, the claim for re-imbursement from the estate of the deceased was not sustainable.

L. P. E. Pugh, Surita and Boren Bose, for the Plaintiffs.

Pankridge, for the Defendants.

JUDGMENT.

This is an originating summons taken out by the administrator with the will annexed of the estate of Donald Fraser Mackenzie, deceased, and by the executors of his will which has been proved in England, to determine a question which arises in the administration of his estate. The question is as to the liability of the estate to pay to MacNeill & Co. a certain sum of money paid by them in circumstances which I will presently state. In my view the procedure by originating summons is not applicable to a contentious matter of this nature which is really a claim by MacNeill & Co. to recover from the estate the sum in question. The procedure should

* (1927) 31 C. W. N. 630 ; A. I. R. (1927) Cal. 518.

have been by suit, but as all parties agree to the matter being decided on originating summons I propose to decide it.

The facts which I take from the plaint are not, I understand, in dispute. Donald Fraser Mackenzie died on the 14th June 1924. At the date of his death he was a partner in the firm of MacNeill & Co., but on his death his interest in that firm ceased as from the 31st March 1924. His income from the firm for the financial year 1923-24 was assessed to income-tax, and income-tax has been paid on that sum. A return for the purposes of income-tax was made to the revenue authorities by the administrator on the 14th March, 1925. On the 20th March 1925 the revenue authorities purported to assess Donald Fraser Mackenzie's estate to super-tax for the year 1924-25. The assessment was made on Donald Fraser Mackenzie's estate c/o Messrs. McNeill & Co. under section 29 of the Indian Income-tax Act (XI of 1922) and a notice was issued under the said Act. By clause (5) of the notice the assessee was informed that an appeal might be presented under section 30 (1) of the said Act within 30 days.

Details of the assessment were given at the end of the notice and they were described as "details of super-tax assessment for 1924-25."

The administrator wrote demurring to the assessment on the 11th May 1925 on the ground that the estate took no interest in the profits of the firm for 1924-25. The revenue authorities replied that the assessment for 1924-25 was made on the income of the previous year ending the 31st March 1924, which income was received by Donald Fraser Mackenzie or by his estate.

The plaint states that the executors intended to contest the claim on the following additional grounds to that stated in the letter, namely, (1) that the assessment was invalid as not having been made on any individual, (2) that the Act does not provide for making an assessment on a dead man's estate and (3) that the income of a dead man was not income of his executors.

Thereafter the revenue authorities demanded payment of the amount from McNeill & Co. who paid the sum on the 19th September 1925. No assessment was made on that firm in respect of this sum.

Under these circumstances McNeill & Co. have demanded repayment to them of this sum from Donald Fraser Mackenzie's estate.

The following questions are raised by the summons :—

(1). Whether the plaintiffs as representing the estate are liable to pay the said sum to McNeill & Co.? (2). Whether the payment was a voluntary payment? (3). Whether the plaintiffs, as administrators and executors, were legally bound to pay the said sum? (4). Whether the assessment was a valid assessment? (5). Whether McNeill & Co. have any interest in the payment? (6). What are the respective legal rights and liabilities in respect of the said sum?

"Assessee" is defined in the Indian Income-tax Act, 1922, as a person by whom income-tax is payable. Section 3 provides that where any Act of the legislature enacts that the income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate shall be charged for that year in accordance with the provisions of the Act in respect of all income, profits and gains of the previous year. Section 22 deals with the making of a return and provides for service of notice on a person required to make a return. Section 26 provides that when any change occurs in the constitution of a firm, the assessment shall be made on the firm as constituted at the time of making the assessment. Section 30 fixes the time of appealing against the amount or rate of assessment, or against liability for assessment, ordinarily as 30 days from the notice of demand. Section 44 provides that when any business has been discontinued every person who was a member of a firm at the time of discontinuance shall be jointly and severally liable for the amount of the tax payable in respect of the profits and gains of the firm.

Chapter IX of the Act deals with **super-tax**. Section 55 provides that in addition to the income-tax charged for any year there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, unregistered firm, Hindu undivided family, or company an additional duty of income-tax at the rate or rates laid down for that year by Act of the Indian legislature.

Section 56 provides that the total income for super-tax is to be the total income assessed for income-tax and a proviso to that section provides that in computing the total income of a member of a registered firm [which is defined in section 2 (14)] where any change occurs in the constitution of the firm, the profits or gains of the firm during the previous year shall be deemed to have been received in that year by the members of the firm as constituted at the time of the making of the assessment to super-tax in proportion to their shares in the firm at that time. Section 57 provides that in case of an assessee who is a member of a registered firm and whose share is liable to super-tax residing out of British India, the remaining members of the firm are jointly and severally liable to pay the super-tax due from the non-resident member.

Section 58 (1) makes all the provisions of the Act applicable to super-tax except *inter alia*, section 3 and sub-section (2) of that section provides that super-tax is payable by the assessee direct except as provided in section 57.

Now, nowhere in the Act can I find that any provision is made for the assessment to income-tax or to super-tax of the estate of any deceased person, and section 55 which imposes super-tax expressly provides that it shall be charged, levied and paid on the total income of the previous year of any individual, unregistered firm, Hindu undivided family, or company. Consequently in my opinion it was not within the competence of the income-tax authorities to assess Donald Fraser Mackenzie's estate to super-tax and there was no liability on the estate to pay such tax. It is true that the assessment was made and not appealed against within the 30 days fixed by section 30, but that section uses the word "ordinarily" and there was nothing to prevent the authorities extorting an appeal preferred after the expiration of 30 days.

This being so, as the estate was under no liability to pay the tax, the payment by McNeill & Co. was a voluntary payment so far as the estate is concerned and does not fall with the provisions of section 69 of the Indian Contract Act. Some point was made that McNeill & Co. made the payment without any assessment being made as the surviving members of the firm, but I think that nothing turns on that, as under the proviso to section 56 they could not have escaped from payment and doubtless this was known to them when they made the payment, and it may have been in their interest to make the payment on the assessment made on Donald Fraser Mackenzie's estate rather than await an assessment on themselves which possibly would have involved a higher payment if Donald Fraser Mackenzie's share of profits for 1923-24 was aggregated with their own shares of profit for that year and super-tax at a higher rate thereby became payable on such aggregated income.

In the view I take it is not necessary for me to decide whether the super-tax in question was payable in respect of the profits of 1923-24, or whether such profits were only taken as measure of taxation for the tax imposed for 1924-25.

I answer the first question raised by the summons in the negative and the second in the affirmative so far as the estate of Donald Fraser Mackenzie is concerned. I answer the third question in the negative as also the fourth, but of course I have had no opportunity of hearing the income-tax authorities on this question. Questions 5 and 6 require no answer.

The plaintiffs can retain and pay their costs out of the estate as between attorney and client. I make no order as to the costs of McNeill & Co.

[173] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Sir Shadi Lal, Kt., Chief Justice and Mr. Justice LeRossignol.

[25th November, 1925].

Tohar Mal Uttam Chand of Amritsar.

.. Assessee.

v.

The Commissioner of Income-tax, Punjab and N. W. F. Province.

Income-tax Act (XI of 1922), Secs 66 (3) & 23 (4)—Order of Single Judge rejecting application for case—Appealability as final Judgment—Letters Patent (Lahore) Cl. 10—Non-production of accounts—If a question of law.

An order of a single Judge of the High Court dismissing an application made under Sec. 66 (3) of the Income-tax Act on the ground that there was no question of law is a final Judgment and is appealable under Clause 10 of the Letters Patent (Lahore).

Tata Iron and Steel Co. v. Chief Rev. Authority. 1 I. T. C. 206, Distinguished.

The question whether an assessee produced all his books of account before the Income-tax Officer is a question of fact and not one of law.

Appeal [Letters Patent Appeal No. 52 of 1924], under section 10 of the Letters Patent from the order of Mr. Justice Abdul Raoof, passed in Civil Miscellaneous No. 15 of 1924, on the 23rd January 1924, rejecting the application praying that the Commissioner of Income-tax be called upon to state the case for the decision of this Hon'ble Court under section 66 of the Income-tax Act, 1922.

*Badri Das, for the Assessee.**Carden Noad, for the Crown.*

JUDGMENT.

The petitioner, an assessee to income-tax, made an application to this Court under the 2nd clause (sic) of section 66 of the Income-tax Act of 1922, praying this Court to require the Commissioner to state the assessee's case and to refer it to this Court. The petition was dismissed by a single Judge of this Court on the ground that no question of law had arisen in the assessment of the tax levied upon the petitioner. From that order the present appeal has been preferred under the Letters Patent of this Court, and a preliminary objection has been raised by the respondents that no appeal lies. Reliance is placed upon the ruling of their Lordships of the Privy Council in *Tata Iron and Steel Company Limited v. The Chief Revenue Authority of Bombay*,⁽¹⁾

As noted by their Lordships in their decision, the matter is not free from difficulty. In that case it was held that the decision, judgment or order made by the Court under section 51 of the Income-tax Act of 1918 was merely advisory, and the respondents contended that if the final order of the Court is merely advisory, a preliminary order refusing to call upon the Commissioner to state the case must be of the same nature. The cases, however, are distinguishable, for the Income-tax Act of 1922 differs from that of 1918 in this respect that under the latter statute the Commissioner of Income-tax was given the power to state the case and refer it to this Court at his discretion, whereas in the Act now in force he can be directed by this Court to state the case even after he has refused to do so at the instance of the assessee. There can be no doubt that the order of the learned Judge in Chambers is a final judgment so far as the proceedings in this Court are concerned and that an order issued by this Court to the Commissioner under section 66 (3) of the present Act is not merely advisory but is mandatory and must be obeyed by that official.

For the foregoing reasons we must hold that the appeal to this Court is competent; and we have heard it on the merits. We find that the crucial point in the case is whether the assessee produced all his books before the assessing Officer. That he did not do so is a question of fact and not of law, and in such a contingency section 23 (4) confers upon the Income-tax Commissioner the power to make the assessment to the best of his judgment.

We dismiss the appeal with costs.

(1) 1 I. T. C. 206.

[174] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Sir Dawson Miller, Kt., Chief Justice and Mr. Justice Macpherson.

[17th March, 1926.]

Raghunath Mahadeo of Kishunganj.

.. Assessee.

v.

The Commissioner of Income-tax, Bihar & Orissa.

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 23 (2), (3) & (4)—Refusal to look into unbalanced accounts—Commissioner's undertaking to take them into consideration.

This case was disposed of on the undertaking given by the Commissioner of Income-tax to consider the assessee's account books which the Income-tax Officer refused to look into merely because there appeared to be no balance struck at the end of the year.

Case stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar & Orissa, in compliance with the order of the High Court dated 15th June, 1925 and reported in 2 I. T. C. 94.

CASE.

Under section 66 (3) of the Indian Income-tax Act, the High Court has ordered me to "draw up a case stating precisely what the facts are with regard to the evidence before the Income-tax Officer and what the effect of the books is." I have examined the books in the presence of the assessee.

2. The assessee, a firm trading under the name of Raghunath Mahadeo, has business in cloth, gold, silver, jute, and spices at Kishunganj. He also has businesses in two other places. In 1924-25, he was called upon to file return of his income of the previous year and he did so. He was then served with a notice under section 23 (2) of the Income-tax Act to produce the evidence on which he relied in support of his return. He produced the accounts of his Kishunganj businesses, but the Income-tax Officer rejected them, because they were not closed and made his assessment on an estimate; but before doing so, the Income-tax Officer served another notice on the assessee to file the accounts for 1979 Sambat of the Kirana business at Kishunganj and this order was not complied with.

3. The order of the Court already quoted above does not indicate on what questions of law this reference is to be made; but I submit that sub-section (3) of section 66 is governed by sub-section (2) and it is therefore incumbent upon me to state the questions of law and my own opinion as well as the facts specifically called for by the Court.

4. The questions of law which appear to be involved in the Court's order and the assessee's application are as follows:—

(a) Whether an assessee should be deemed to have failed to comply with an order under section 23 (2), if the Income tax Officer rejects the evidence produced.

(b) Whether an appeal lies when the Income-tax Officer purports to make an assessment under section 23 (3), but the circumstances are such that the assessment ought to have been made under section 23 (4), and

(c) Whether the Income-tax Officer was justified in rejecting the accounts.

5. (a) I entirely accept the view that if an assessee is only ordered to produce the evidence on which he relies, the rejection of the evidence will not deprive him of the right of appeal. In the present case, the observations of the Hon'ble Court appear to be due to their not having been apprised of the fact that a second notice was issued on the assessee. The Court has observed that the Commissioner seems to have thought that because the books produced in obedience to the notice under section 23 (2) were not relied upon, therefore the assessee had not complied with the notice served on him under section 23 (2). This, however, was not my view. The Court was obviously not aware that any other notice was served on the assessee. It was not stated in this notice under what section it was issued; but if it was a notice to produce the particular account of a particular year, I submit that it must

have been a notice under section 22 (4). It may be mentioned that the form of this notice has not been prescribed either by the law or by any statutory rule. Had the notice been under section 23 (3), the Income-tax Officer must have specified the point on which the evidence was required; for instance, he might have asked for collateral evidence of a particular item of expenditure; but since he called for a complete account, he can only have done so under the section which empowers him to do so, i.e., under section 22 (4). I submit that where an officer is exercising a power conferred on him by statute, his action is not invalidated by mere failure to mention the section under which he is acting, though I concede that it is unbusiness-like not to mention it. I am therefore of opinion that the assessee failed to comply with a notice under section 22 (4), and that legally the assessment could only have been made under section 23 (4) and consequently the assessee had no right of appeal.

(b) In my opinion this question should be answered in the negative. The law lays down that in certain circumstances the Income-tax Officer shall make the assessment under section 23 (4) and that no appeal shall then lie. I submit that it is not legal for the Income-tax Officer to make an assessment under section 23 (3) when the circumstances exist which under the law make it compulsory to frame the assessment under section 23 (4). The law gives the Income-tax Officer no option and if he purports to make the assessment under section 23 (3) when it ought to have been made under section 23 (4), his action has no validity, and the assessment must be regarded as having been made under section 23 (4).

(c) I venture to submit that it is not clear to me in what sense the question whether the accounts were rejected on insufficient grounds, is a question of law. I would suggest that it is a question of accountancy. Matters of accountancy are, I conceive, not governed by statute or other law, but by the principles of mathematics and the science and practice of accountancy. However, I consider that the accounts were not rejected on insufficient grounds in this case so that this question does not arise.

K. P. Jayaswal and S. M. Gupta, for the assessee.

C. M. Agarwala, for the Crown.

JUDGMENT.

This application will be disposed of upon the undertaking given by the learned Counsel for the Commissioner of Income-tax that the Commissioner will consider the books relating to the cloth, silver, gold and jute business at Kishangunj and if he thinks that the evidence in those books is satisfactory, then he will take them into account in considering the question of reduction of the assessment made by the Income-tax Officer. If he does not consider that these books represent the actual state of affairs, then of course he is entitled to give them such weight as he may consider proper or no weight at all. We wish to add that all that the assessee requires is that his books shall be considered and not that they should be rejected merely because there appears to have been no balance struck at the end of the year. We may also add that a difficulty has arisen owing to the Commissioner, although he deals with certain questions of law, having failed to state the facts relating to these books and the effect of the evidence derived from them as we asked him to do.

We consider in this case that the whole trouble has arisen because the Income-tax Officer in the first instance and the Assistant Commissioner subsequently have refused to consider the assessee's books at all. Now the Commissioner has undertaken at all events to consider the books and we think that the assessee should have the costs of this application and fix the hearing fee at Rs. 200.

[175] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Sir Cecil Walsh, Kt. Ag. Chief Justice and Mr. Justice Bannerji.

[3rd February, 1927]

Messrs. Dina Nath Hemraj of Cawnpore . . . Assessee. *

v.

The Commissioner of Income-tax, United Provinces . . . Referring Officer.

Income-tax Act (XI of 1922), Ss. 64 and 66—Question as to principal place of business - No determination under S. 64 (3)—Assessment by Income-tax Officer illegal—Jurisdiction of High Court—Objection, when to be taken—Commissioner's findings not supported by evidence—Assessment after firm ceased business, legality of.

Where before assessment a question has arisen under Sec. 64 of the Act as to the principal place of business of an assessee, the Income-tax Officer cannot himself decide the same and an assessment by him as though the principal place of business is within his jurisdiction without the determination of this question by the authorities specified in Sec. 54 (3) is illegal.

The determination of such a question under Sec. 64 (3) is final and the High Court has no power to interfere with it or to have it brought before it, except on a case stated under Sec. 66 (1) by the Commissioner acting on his own motion. But in a case of illegal assumption of authority by the Income-tax Officer and a total failure to apply the provisions of Sec. 64, the existence of the remedy under Sec. 64 (3) will not bar the right of the assessee to require the Commissioner to state a case, or the jurisdiction of the Court thereon.

An order for stating a case is in the nature of a rule *nisi* and the Commissioner appearing before the Court to argue the case can take objection that under the law there was no power to issue the rule and hence no jurisdiction in the Court to decide the questions raised in the case. Such objection should in strictness be taken at the time when the Court made the order after notice to the Commissioner.

Where the Commissioner misdirected himself in arriving at the finding as to the assessee's principal place of business, the High Court overruled it on the ground that on the facts stated there was no evidence to support it.

The Income-tax Officer has jurisdiction to assess a firm though at the time of assessment the business of the firm had come to an end and its members were no longer carrying on business at all.

Case [Miscellaneous Application No. 512 of 1926] stated under Sec. 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, for the opinion of the High Court.

CASE.

A firm which carried on business in Cawnpore in the year 1923-24 for the supply of castor seeds to the East Indian Railway at Manauri under the name of Messrs. Dina Nath Hem Raj was assessed by the Income-tax Officer, Cawnpore, under section 23 (4) of the Indian Income-tax Act, 1922, on December 8, 1924. The assessee filed a petition under sections 27 and 35 of the Income-tax Act on January 8, 1925, asking for the cancellation and rectification of the assessment. The petition was rejected and the Income-tax Officer's decision was upheld on appeal by the Assistant Commissioner of Income-tax, Cawnpore, in an order, dated October 7, 1925. The assessee presented a petition to the Commissioner of Income-tax on November 3, 1925, asking that the Commissioner should interfere in review under section 33 of the Income-tax Act or, in the alternative, should refer the case to the High Court under section 66 (2) of the Act for decision on certain points of law. The Commissioner in an order, dated December 23, 1925, held that no question of law arose out of the appellate order of the Assistant Commissioner and declined to state a case. The High Court has now issued an order under section 66 (3) of the Income-tax Act requiring the Commissioner to state a case on certain specified points of law.

2. The facts of the case are somewhat intricate, but the Commissioner will attempt to state them as briefly as possible. They are as follows :—

(i) The firm of Messrs. Dina Nath Hem Raj of Calcutta secured a contract in its own name for the supply of castor seeds to the East Indian Railway during the year 1923-24. The contract was given in Calcutta and payments on its account were

* (1927) 25 A. L. J. 225; A. I. R. (1927) All. 299.

made by the railway to the contractor in Calcutta. For the purpose of executing the contract an unregistered firm was established comprising the following partners :—

(i) the firm of Messrs. Dina Nath Hem Raj which secured the contract	..	8 annas.
(ii) the firm of Messrs. Diwan Chand and Sons of Lahore	..	4 ..
(iii) the firm of Messrs. Narain Das of Cawnpore	..	4 ..

No deed of partnership was drawn up and the relationship among the partners is obscure. On the one hand Messrs. Narain Das Lachhman Das made a statement before the Income-tax Officer, Cawnpore, saying that they had held a four annas share in the castor-seed business carried on at Cawnpore and that most of the purchases had been made by them. The Income-tax Officer had also received information from another source that the partnership was arranged in Cawnpore and was perfectly genuine. The Income-tax Officer also learnt, as stated in his letter to the Income-tax Officer, Calcutta, dated October 27, 1924, that no control or management of the business was in the hands of the Calcutta firm and that the accounts were maintained by Messrs. Narain Das Lachhman Das and that the profit was worked out by them. On the other hand Messrs. Dina Nath Hem Raj of Calcutta claimed that the partnership was constituted in Calcutta, that all the business of the firm was carried out there so far as purchases were made in different places and that the firm was dissolved in Calcutta by a deed executed there in July, 1924. They also contended before the Income-tax Officer, Calcutta, that "Messrs. Narain Das Lachhman Das could not claim a higher position or status in the firm of Messrs. Dina Nath Hem Raj than other purchasing agents similarly making or supervising purchases at different centres."

3. When the question of issuing a notice for a return of income under section 22 (2) of the Income-tax Act arose some doubt was felt by the Income-tax Officer, Cawnpore, and also by the Income-tax Officer, Lahore (apparently the place of origin of the Calcutta firm), as to the action to be taken, and these Officers made inquiries from each other and also from Calcutta. On receipt of the inquiries from Lahore, an Income-tax Officer in Calcutta began an investigation and called for the accounts of the firm, September 18, 1924, being fixed for the purpose. But on September 8, 1924, the Income-tax Officer, Cawnpore, cancelled his inquiry as the business in Cawnpore had, on the information received by him, been conducted by a separate unregistered firm so that the profits would be assessed in Cawnpore. The firm of Messrs. Dina Nath Hem Raj of Calcutta appeared before the Income-tax Officer in Calcutta on September 18, 1924, and claimed assessment in Calcutta. The firm was required to put in an affidavit and did so, but the Income-tax Officer refused to accept it without corroborating evidence and called for that evidence on November 4, 1924. The case was postponed at the instance of the firm till November 18 when B. bu Dina Nath appeared and in support of his contention produced (i) letters to the Calcutta firm from the East Indian Railway, (ii) a municipal licence to trade in Calcutta which the Income-tax Officer in Calcutta apparently considered to be of little weight as the firm of Messrs. Dina Nath Hem Raj of Calcutta were already carrying on business there, and (iii) a number of telegrams and letters most of which were irrelevant but some of which showed that details of the purchase of goods at, and their despatch from, Hathras were reported for information to Calcutta, while others were from Cawnpore asking for funds and (in one case) requesting apparently that arrangements be made in Moradabad for the loading of wagons. A pass book of the Imperial Bank was produced to show numerous debit and credit entries in the name of the Calcutta firm. The Income-tax Officer decided to form no conclusion at the moment on the contention of the firm but at the same time assumed jurisdiction by directing the issue of a notice calling for a return of income under section 22 (2) of the Income-tax Act. Unfortunately this assumption of jurisdiction was not communicated to the Income-tax Officer, Cawnpore, when the copy of the note recorded on November 18, 1924 (which has already been seen by the High Court) was forwarded to him.

4. In the meantime the Income-tax Officer, Cawnpore, had been corresponding with the Income-tax Officer dealing with the case in Calcutta, claiming jurisdiction in the matter. He also entered into correspondence with Messrs. Dina Nath Hem Raj (letters of the Income-tax Officer, dated September 8, 1924, and October 24, 1924, and of the firm dated October 21, 1924, and October 28, 1924). In his letter of September 8, the Income-tax Officer enclosed a notice calling for a return of income, which in its letter of October 24 the firm asked the Income-tax Officer to cancel. The latter replied on October 24 that the assessment would be made in Cawnpore and asking the firm to comply with the notice issued by him, at the same time warning the firm of the disabilities likely to be incurred in case of non-compliance. To this the firm (October 28) demurred.

5. On December 8, 1924, the Income-tax Officer, Cawnpore, made an assessment on the firm, informing the Income-tax Officer in Calcutta of his action. The firm of Messrs. Dina Nath Hem Raj wished the Income-tax Officer in Calcutta to proceed with its assessment including the profits from Cawnpore but after consideration that Officer decided to deal with the income in Calcutta alone.

6. The High Court has directed me to state a case with reference to the following points of law :—

(1) Whether in view of the facts and circumstances as stated in this special case, of the petitioner's business in connexion with the purchase, sale, receipt and distribution of profit, of castor-seeds delivered to the East Indian Railway at Manauri, the business was, during the material period, carried on in Cawnpore within the meaning of section 64.

(2) Whether if it is eventually found that the petitioner's business was carried on in Cawnpore, the Income-tax authorities acted in accordance with the Act in assessing them by way of summary assessment while a *bona fide* dispute was going on as to whether they were liable to be assessed in Cawnpore at all.

(3) Consequential upon the foregoing questions whether it was the duty of the Income-tax authorities to obtain a decision under section 64 (3), and

(4) Whether having regard to the fact that the particular venture had come to an end, and the members of the partnership who had taken part in it were no longer carrying on business at all, the Income-tax authorities at Cawnpore had jurisdiction to make the assessment upon the firm, even if it had carried on business at Cawnpore, such business no longer existing.

7. The usual practice of the Commissioner is to state his views briefly and to leave the arguments of the case to counsel. But the case is one of considerable difficulty and the Commissioner would request the permission of the Hon'ble Judges to deal with it at some length. In doing so he would note that he has not seen any of the papers prepared in Calcutta other than those on the record prepared at Cawnpore.

8. It is quite a common occurrence for firms in one place to open a business in another place and to take in a local partner for the purpose. Although the firm starting the business may finance the business entirely or for the greater part, the business is regarded for income-tax purposes as that of the local firm which is assessed by the Income-tax Officer within whose jurisdiction the business is carried on. Thus the Income-tax Officer, Cawnpore, knowing from a definite statement made to him by a Cawnpore firm which was one of the partners in the firm now under discussion, that the business was carried on in Cawnpore and that there was a separate partnership for the purpose, was justified, in the opinion of the Commissioner, in calling for a return of income. The notice under section 22 (2) of the Income-tax Act was thus legally issued and it was incumbent on the assessee to comply with that notice. If he had done so he could have claimed and proceeded to prove by the production of his books, the acid test in cases of this type, that the business should be assessed elsewhere than in Cawnpore. And if his contention had been rejected he could have appealed to the Assistant Commissioner and could also have claimed a reference to the

Commissioner under the provisions of section 64 (3) and further in the circumstances of the case, he could have asked the Commissioner of Income-tax, United Provinces, to consult the Commissioner of Income-tax, Bengal, and in the event of disagreement to refer the matter for the decision of the Central Board of Revenue which by the proviso to that sub-section must have heard his arguments before coming to a decision. He could also have obtained the same result by putting in his return of income and claiming a reference to the Commissioner as to the jurisdiction of the Income-tax Officer. The case would then have been decided one way or the other in accordance with the provisions of the Act regarding the place of assessment, or in other words a decision would have been given as to the Income-tax Officer who was to make the assessment. A decision made under section 64, being on a question of fact, would not, the Commissioner ventures to think, fall within the purview of section 66 and thus be a matter for the exercise of their special jurisdiction by the High Court.

As it is, the Commissioner does not consider it to have been established that the principal place of business was in Calcutta. It is true that the contract was given by the East Indian Railway to the Calcutta firm, and it necessarily follows that, whatever arrangements were made for executing the contract, all correspondence between the contracting parties regarding the contract would be conducted by the Calcutta firm and all payments would be made to it by the railway. The Calcutta firm, the Commissioner thinks, would also be the natural party to press the East Indian Railway to obtain urgent assistance from the Oudh and Rohilkhand Railway in the matter of loading wagons as the head office of the East Indian Railway Company is there. That firm would also appear to have had an important part in the financing of the business, although there is nothing to indicate to what extent this financing in the later months of the contract was really met out of the money paid by the East Indian Railway for partial fulfilment of the contract. There is also nothing to indicate what capital, if any, was invested by the other partners or where the real control was exercised. In the latter respect it must be borne in mind that the Cawnpore partner was one of the largest Indian firms in Cawnpore and was already conducting business of this nature and was thus an expert partner whose importance was at least as great as, if not greater than, that of the financing partner. And the fact that the Cawnpore firm asked the Calcutta firm to make certain railway arrangements at Moradabad justifies the inference that the Cawnpore partner had been making purchases as far afield as Moradabad. It was preferable that the evidence on these matters should not be a statement in an affidavit which was not susceptible of check or correspondence of a partial nature but rather the account books themselves which would have shown conclusively where the true accounts of the business were maintained and where the books were made up and the profits calculated. The books were never produced. Indeed they were alleged to have been destroyed when the partnership in castor-seeds was dissolved—an act so contrary to the practice normally followed by Indian businessmen who maintain their books with care for long periods and so improbable when the magnitude of the transactions involved is considered—over fourteen lakhs of rupees were received from the railway—as to be unworthy of credence. It is common knowledge that books are alleged to have disappeared when it is to the advantage of the persons who prepared them. And the advantage of their disappearance to the assessee in this case was great as the total income of the Calcutta firm, including the profits of the business in castor-seeds, was calculated in Calcutta to have been a lakh of rupees whereas the assessment in Cawnpore which, as the assessment note shows, was based on such detailed analysis as was possible and on prices at Cawnpore which were not known to the authorities in Calcutta, was 3.20 lakhs.

On the first point in the reference, therefore, the Commissioner is of opinion that it is not established that the business was not carried on in Cawnpore. He thinks rather that it is a fair inference that the business was conducted in Cawnpore and that the assessment was correctly made there.

9. The second and third points may be considered together. The Commissioner would point out that the proceedings taken in Calcutta up to November 18, 1924, were

strictly informal and not prescribed in the Income-tax Act at all. The only proceeding under the Act was that taken by the Income-tax Officer, Cawnpore, when, on September 6, 1924, a notice was issued to Messrs. Dina Nath Hem Raj calling on them to file a return of income on or before October 20, 1924. That notice was met by the assessee by a denial of jurisdiction. The Income-tax Officer acted quite openly as he informed the assessee that he intended to take up the assessment and warned him of the disability involved in non-compliance with a notice duly issued under the Income-tax Act. The assessee continued to dispute the jurisdiction of the Income-tax Officer, Cawnpore, but did not thereby acquire a right to disregard the notice issued, the more so as at this time no notice under section 22 (2) had been issued in Calcutta. So far as the Income-tax Officer at Cawnpore was aware there was technically no dispute between him and the Income-tax Officer in Calcutta. The latter had been requested on several occasions by the Income-tax Officer, Cawnpore, to refer the matter to higher authority, if he did not accept the contention that the place of assessment was Cawnpore. But the portion of the order passed by the Income-tax Officer in Calcutta on November 18, 1924, which was communicated to the Income-tax Officer Cawnpore, was indeterminate and the latter proceeded to make an assessment. He was not informed of the assumption of jurisdiction by the Income-tax Officer in Calcutta and this oversight is to be regretted as the question must then have been referred to both Commissioners immediately. In the event the Income-tax Officer in Calcutta accepted the fact of the assessment in Cawnpore. In the opinion of the Commissioner there was nothing contrary to the provisions of the Income-tax Act in the action of the Income-tax Officer, Cawnpore. And in the circumstances known to him it was not incumbent on him to move the Commissioner of Income-tax, United Provinces, to address the Commissioner of Income-tax, Bengal. The Commissioner recognizes that his opinion may be considered to be based on narrow grounds of a technical nature, but he has stated what he conceives to be the real position in the case. The Commissioner would emphasize that from the point of view of the revenue it was immaterial where the assessment was made provided that the accounts were produced. And normally every effort is made to meet the wishes of assesseees. It is a matter for regret that the Income-tax Officer, Cawnpore, did not postpone his proceedings for a period but that does not make his action contrary to the law.

10. There remains the fourth point. In the opinion of the Commissioner the assessment must be made in the place in which the business was carried on. This particular business of the supply of castor-seeds is covered by the provisions of sub-sections (1), (2) and (4) of section 25, which provide for the assessment of the profits, and of section 44 which fix the liability for the payment of the tax, if any, assessed.

11. The Commissioner has now dealt with all the points of law stated in the order of the High Court. There is one question, however, which he would ask the permission of the Court to raise—not in any spirit of antagonism or contumacy but for his guidance in the future as the principle involved is of grave importance in the administration of the Income-tax Act. The Commissioner does not wish to be in the position of appearing to refuse relief which the High Court considers to be due and to reject lightly any applications under section 66 (2) but the order in the present case has filled him with considerable doubt.

Section 23 (4) provides categorically that, if any person to whom a notice has been issued calling for a return of income under sub-section (2) of section 22 fails to file a return, the Income-tax Officer shall make the assessment to the best of his judgment, and under sub-section (1) of section 30 of the Act it is provided that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23. As no appeal lies no order can be passed under section 31 and there will, therefore, be no question of law arising out of such an order. The only remedy which an assessee has is to move the Commissioner to exercise his powers of review under section 33, or to file a petition under section 27 of the Act showing that he was prevented by sufficient cause from making the return required by section 22. An appeal lies against an

order passed by the Income-tax Officer under this section and thus the case would reach the High Court on the point whether the assessee was prevented by sufficient cause from making a return. Any dispute as to jurisdiction falls within the provisions of section 64 of the Act under which the final arbiter is the Central Board of Revenue and not the High Court. The question, therefore, which the Commissioner requests permission to raise is—

Has the High Court power, under section 66 of the Indian Income-tax Act, 1922, to overrule a decision of an Income-tax Officer concerning his power to assess in the face of the provisions of section 64 of the Act which lay down a special procedure and a special form for the decision of disputes as to that power?

The Commissioner is required to state his own opinion in submitting a question of law for decision and he, therefore, would say that in his opinion the answer is in the negative.

12. Dr. Katju, the advocate of the assessee, requested that the point of law stated in the foregoing paragraph, if admitted, should be in the following terms:—

"Has the High Court power, under section 66 of the Income-tax Act, to declare that an Income-tax Officer who made an assessment without obtaining a decision of the superior Income-tax authorities as provided for by section 64 (3) of the Act, acted illegally and without jurisdiction, and the said assessment was *ultra vires* and therefore null and void?"

The Commissioner replied that he was unable to state the point of law in the manner suggested as his point related to jurisdiction in its widest sense, while the third point of law stated by the High Court covers that raised by Dr. Katju if the question raised in paragraph 11 were answered in the affirmative. Dr. Katju in reply has expressed the view that the question framed by him follows as a virtual corollary from the question stated in paragraph 11 and has requested that it be added to that question in this reference. The Commissioner has acted accordingly.

13. To recapitulate—the points of law stated by the High Court are:—

(i) Whether in view of the facts and circumstances, as stated in this special case, of the petitioner's business in connection with the purchase, sale, receipt and distribution of profit, of castor-seeds delivered to the East Indian Railway at Manauri, the business was, during the material period carried on in Cawnpore within the meaning of section 64.

(ii) Whether if it is eventually found that the petitioner's business was carried on in Cawnpore, the Income-tax authorities acted in accordance with the Act in assessing them by way of summary assessment while a *bona fide* dispute was going on as to whether they were liable to be assessed in Cawnpore at all.

(iii) Consequential upon the foregoing questions whether it was the duty of the Income-tax authorities to obtain a decision under section 64 (3), and

(iv) Whether having regard to the fact that the particular venture had come to an end, and the members of the partnership who had taken part in it were no longer carrying on business at all, the Income-tax authorities at Cawnpore had jurisdiction to make the assessment upon the firm, even if it had carried on business at Cawnpore, such business no longer existing,

while the Commissioner has requested permission to raise another point—

(v) Has the High Court power, under section 66 of the Indian Income-tax Act, 1922, to overrule a decision of an Income-tax Officer concerning his power to assess in the face of the provisions of section 64 of the Act which lay down a special procedure and a special forum for the decision of disputes as to that power?

Dr. Katju has requested that the following point be added to the list:—

"Has the High Court power, under section 66 of the Income-tax Act, to declare that an Income-tax Officer who made an assessment without obtaining a decision of the superior Income-tax authorities as provided for by section 64 (3) of the Act, acted

illegally and without jurisdiction, and the said assessment was *ultra vires* and therefore null and void."

14. The Commissioner's opinion is that the answer to the first, second and fourth points is in the affirmative, and to the third and fifth points is in the negative, and that the point raised by Dr. Katju is covered by the other points.

Kailas Nath Katju, for the assessee.

C. W. Dillon, for the Crown.

JUDGMENT.

This is a case stated under section 66 of the Income-tax Act of 1922. The case has been stated by the Commissioner and printed, a matter of great convenience to the Court. The questions upon which the case was stated are set out on page 4 of the case, and are as follows :—" 6. The High Court has directed me to state a case with reference to the following points of law :—

(1) Whether in view of the facts and circumstances as stated in this special case, of the petitioner's business in connection with the purchase, sale, receipt and distribution of profit, of castor-seeds delivered to the East Indian Railway at Manauri the business was, during the material period, carried on in Cawnpore within the meaning of section 64.

(2) Whether if it is eventually found that the petitioner's business was carried on in Cawnpore, the Income-tax authorities acted in accordance with the Act in assessing them by way of summary assessment while a *bona fide* dispute was going on as to whether they were liable to be assessed in Cawnpore at all.

(3) Consequential upon the foregoing questions whether it was the duty of the Income-tax authorities to obtain a decision under section 64 (3), and

(4) Whether having regard to the fact that the particular venture had come to an end, and the members of the partnership who had taken part in it were no longer carrying on business at all, the Income-tax authorities at Cawnpore had jurisdiction to make the assessment upon the firm, even if it had carried on business at Cawnpore, such business no longer existing."

The Commissioner has requested permission to raise another question, which we will deal with in a moment, and which in substance challenges the jurisdiction of the High Court, to direct a case to be stated in this matter owing to the provisions of section 64.

Before dealing with this question of jurisdiction, it is necessary to make two preliminary observations. As a rule it is better in a statement of a case to confine the case to findings of fact, and to the expression of the Commissioner's opinion upon the points raised, and not to burden the case with arguments, or in the case to question the jurisdiction of the Court to require a case to be stated. We would not, however, be taken to hold that the Commissioner, or any other body, in a case where the Act provides for a case to be stated for the opinion of the High Court, has no right to question the jurisdiction of the Court in directing the particular case in question. In order to make our meaning clear, we would point out that an order for a case to be stated is in the nature of what is known in Calcutta and in England as the issue of rule *nisi* to show cause on certain questions indicated in the order made by the High Court. The Commissioner, or other authority, in stating the case in effect shows cause against the contention of the other side, and in showing cause he is clearly at liberty, when he appears before the Court to argue the case, to take the objection that under the law there was no power to issue the rule, or to direct the case to be stated, and that therefore the High Court has no jurisdiction to decide the question raised in the case.

The second observation is that in strictness the objection should have been taken at the time of the argument, namely, the 22nd of October 1926, when the question of whether it was a fit case in which a case ought to be directed to be stated was discussed, and this Bench made the order. It so happens that in this particular instance the

matter came before the High Court twice. Mr. Justice Kanhaiya Lal and Mr. Justice Ashworth, sitting together on the 14th of July 1926, issued notice to the Commissioner of Income-tax and Government Advocate, without directing a case to be stated. So that a further preliminary stage occurred when the Government Advocate appeared on behalf of the Commissioner of Income-tax before this Bench in October. In their order, the above-mentioned learned Judges stated that "it will be a further point of law whether the decision on the evidence, if any, could be arrived at all in these Provinces, without reference to the Commissioner of Income-tax of Calcutta". This was clearly directed to section 64 (3), which is the sub-section on which the Commissioner now relies; and the third question of those which this Bench ordered to be stated by their order in October, deals with the same sub-section. No objection was made in October on behalf of the Commissioner that this sub-section concluded the matter and ousted the jurisdiction of the High Court under section 66.

It appears to us that the Income-tax Officer of Cawnpore who dealt with this matter in the ordinary course of his duty, wholly overlooked this provision, and that the Commissioner's attention was not drawn to it, and further that it is entirely owing to this oversight that the matter has got into the complicated condition in which we now find it.

The question which has arisen between the assessee and the Income-tax authorities is really a perfectly simple one, namely, whether the partnership, or firm, formed for a special undertaking, being the assessee, had its principal place of business in Cawnpore or Calcutta. It is said that the facts of the case are intricate, but we do not agree. As will appear hereafter the facts relating to this particular business, which was only of a temporary character, are by no means uncommon, and according to the ordinary tests, which are applied in such cases, it ought not to be difficult to find as a fact where their principal place of business was, although the matter has now come before us really as a question of law, to decide whether the Income-tax authorities had any evidence upon which, having regard to all the facts of the case, they could hold that the principal place of business was in Cawnpore. What is intricate is the legal tangle into which the simple issue, which arose, has been allowed to drift, and the unfortunate delay which has taken place in arriving at a final settlement of the question which became acute in October 1924, and is still unsettled after a controversy of over two years. The initial mistake appears to us to have been the assessment of the firm by the Income-tax Officer in Cawnpore under section 23 (4) of the Act, on December 8th, 1924, not of a branch business carried on in Cawnpore, or of the profits arising within the jurisdiction of Cawnpore, but upon the presumption that the principal place of business was in Cawnpore, when a question had arisen between the assessee and the Income-tax authorities with regard to that very question, and had not been decided in accordance with the provisions of the Act contained in section 64 (3).

That a question had arisen within the meaning of section 64 (3) there cannot be the slightest doubt. In a letter dated September 8th, the Income-tax Officer expressed his intention of making the assessment in Cawnpore of the whole profit of the business in castor-seeds, carried on in the former year in partnership. The assessee, the name of the firm being taken from the principal partner, namely, Messrs. Dina Nath Hem Raj, 10, Cross Street, Calcutta, writing from Calcutta, on the 21st of October, informed the Income-tax Officer that Calcutta was the principal place of business of the partnership, and that they were prepared to prove that fact to the satisfaction of the Income-tax Officer. They stated that they had already filed an affidavit in Calcutta to that effect. On the 24th of October the Income-tax Officer answered that Calcutta could not be considered the principal place of business, and that no part of the business was carried on at Calcutta, and insisting upon his right to assess the profits of the whole business in Cawnpore, informed the assessee that he had written to the Income-tax Officer at Calcutta to the same effect. Finally the assessee on the 24th of October wrote from Calcutta regretting that they were unable to see

eye to eye with the Income-tax Officer in this matter. They seem to have acted with circumspection in this matter except that a branch in Cawnpore failed to produce their books. They went on to say that although it did not matter much where the assessment was made, in Calcutta or in Cawnpore, they asked the Income-tax Officer to take into consideration the fact that it would cause serious inconvenience and loss to them if the assessment was made in Cawnpore, and they gave reasons for this contention, pointing out what is admitted to be correct, that the business relating to the castor seeds was done by the Calcutta firm with the East Indian Railway, and that the contract was entered into in Calcutta, and that as a matter of fact the Income-tax Officer in Calcutta was already arranging to take evidence upon the point. There may be some difference in the method of calculating profit in the different provinces. This is a matter for the Income-tax authorities. We were told that the payments by the East Indian Railway amounted to 14 lakhs, and that the Calcutta authorities had assessed the profit at one lakh, while in Cawnpore it had been assessed at 3 lakhs. In the former case a profit of one lakh, upon an outlay of 13, would be nearly 8 per cent. In the latter case the outlay would be only 11, and the profit 3, equalling more than 26 per cent., but the latter was admittedly arrived at *ex parte* without any materials provided by the firm, which may account for the very large difference. The suggestion seemed to be made in argument, that the assessee had for this reason contended for Calcutta, and it is therefore right to emphasise that the question about the principal place of business arose before any assessment had been made, and that there is nothing in the case to show that they did not act *bona fide* in raising the question.

It is quite clear, therefore, that in October 1924 a question had arisen within the meaning of the section. It is equally clear that both parties were either unaware of, or ignored section 64 (3). This question having arisen, the Income-tax Officer, subject to a proviso hereafter to be mentioned, had no jurisdiction to decide the question of the principal place of business, and certainly no jurisdiction to assume it, and no right to assess the firm on the profits of the whole business as though its principal business were in Cawnpore, a question which was still undecided. The Act provides that where the question about the principal place of business is between places in more provinces than one, it shall be determined by the Commissioners concerned, and if they are not in agreement, by the Board of Inland Revenue, and that the assessee shall have an opportunity of representing his views. The Act does not go on to say who shall set the Commissioner in motion, but the reasonable inference to be drawn from the language used is that this is the duty of the Income-tax Officer. The sub-section itself contains a direct reference to the assessee and provides that the assessee shall have an opportunity of representing his views before the question is determined. An express provision of that kind seems to exclude an implied provision that the duty is thrown upon him of securing the determination of the question. On the other hand the Income tax Officer is the person who first becomes aware of the question which has arisen, and it seems reasonable to hold, and it certainly simplifies the working of the section, that he should immediately communicate the fact of such question having arisen to his own Commissioner with whom he is in constant touch, and who is then in a position to exercise the function imposed upon him, as the case may be, giving the assessee an opportunity of representing his views. What is quite clear is that the Income-tax Officer cannot himself decide this question, or act as though it had been determined in accordance with the provisions of this section, and that if he proceeds to prejudge the issue, act as though it had been determined and to assess the firm as though their principal place of business was in his own jurisdiction, in spite of the dispute being still undetermined, he is doing something not authorised by the Act—in other words an illegality. It is quite true that the following sub-section, namely, sub-section 4, provides that “notwithstanding anything contained in this section, every Income-tax Officer shall have all the powers conferred by or under this Act on him in respect of any income, profits or gains accruing or arising or received within the area for which he is appointed.” This means that he can proceed to

assess a branch, as such, if he has the materials for so doing. What would be the result of such an assessment of the branch if the decision afterwards is that the principal place of business is in another province we need not stop to enquire. It is perfectly clear from the language used by the Income-tax Officer throughout, and in the letters from which we have quoted which are set out in full in the case, that he proceeded to assess the firm on December 8th, 1924, as though its principal place of business was in Cawnpore.

We now turn to the actual question raised by the Commissioner. The question is not stated in a very satisfactory manner. He asks "Has the High Court power under section 66 of the Indian Income-tax Act of 1922 to overrule a decision of an Income-tax Officer concerning his power to assess in the face of the provisions of section 64 of the Act, which lay down a special procedure and a special forum for the decision of disputes as to that power?". In one sense of that embarrassing question the answer must be 'no'. The High Court indeed has no power to overrule anything done by an Income-tax Officer or the Commissioner. Where such a question, as we have indicated, arises as to the principal place of business, and such question has been determined by the Commissioner, or where the question is between places in more provinces than one, by the Commissioners concerned, or by the Board of Inland Revenue, such decision is final. There is no right of appeal, and no power in the High Court to interfere with it, nor do the provisions of section 66 give the assessee a right to require the Commissioner to refer to the High Court any question of law, or in the event of his refusal, to apply to the High Court for a statement of the case, apply to a decision made under section 64. No doubt under section 66 (1) the Commissioner may on his own motion refer a case to the High Court on any question of law arising in the determination of the question under section 64, but this seems to be the only way in which the determination of such question can be brought before the High Court. On the other hand the question put by the Commissioner, applied to the circumstances of this case, appears to be misleading because it assumes that the High Court was asked to overrule a decision of the Income-tax Officer concerning his power to assess, a decision which in the face of the provisions of section 64, he had no power to make, and it assumes also that the special procedure and special forum under section 64 had been adopted when it is admitted that it had not.

We are compelled to hold in this case that there being a total failure on the part of the Income-tax authorities to apply the plain provisions of section 64, and on the other hand an illegal assumption of authority by the Income-tax Officer in Cawnpore to assess the assessee, as though their principal place of business had been determined to be in Cawnpore, the existence of an alternative remedy under section 64 (3) does not affect this case, and cannot be held to be a bar to the right of the appellant to have a case stated, and the jurisdiction of the High Court to answer those questions in the way in which it holds they ought to be answered.

Owing to the disregard of the machinery provided by section 64 (3) and to the wholly irregular proceedings, as they appear to us to have been, which have necessarily followed upon the action of the Income-tax Officer in Cawnpore, in assessing the profits of the firm or of this special business as though the principal place of business had been determined to be in Cawnpore, the subsequent proceedings appear to have been irregular in form and infructuous in substance. We need not dwell upon the immediate proceeding which took place between the order of the 8th of December 1924 and the order of the Commissioner of the 23rd of December 1925, refusing to state a case on a question of law, which question was undoubtedly raised in the course of the appeal, and discussed by the Commissioner in his order, and held by him to be a question of fact only. To refuse to answer the question on the ground that the procedure by which this stage has been reached is irregular, would in our view be a denial of justice. The responsibility for the tangle which has occurred, appears to us to lie almost, if not entirely, on the Income-tax authorities, by which we mean the failure of the Income-tax Officer in Cawnpore to draw the attention of the Commissioner to the fact that a dispute had arisen about the principal place of business. The

controversy having drifted away from the prescribed method or machinery for determining it, which is provided by the Act, and each of the parties to it having made up their minds that they were right, it is not surprising that both of them indulged in arguments and indeed in procedure, which appears to us, strictly regarded, to be irregular, and as things now stand to be irrelevant; but inasmuch as the whole trouble has arisen from the initial irregularity on the part of the Income-tax authorities, and inasmuch as also the assessee has been assessed, in our view, with fundamental irregularity, and in any case in default by an *ex parte* decision, when as a matter of fact he has committed no default, and inasmuch as also, in our view, if the law is correctly applied to the evidence, the only proper inference which any court of law could draw from the facts is that the principal place of business is in Calcutta and not in Cawnpore, it seems to us that it would be a denial of justice, either for us to refuse to answer the questions raised by the case, or for the Commissioner to deal with the matter finally, otherwise than in accordance with the answers which we now proceed to give.

In our previous order we endeavoured to make it plain how a mixed question of fact and law, or how a question, which is no doubt in one sense a question of fact, may become a question of law, or in other words how it may be said that taking all the facts together there is no evidence upon which a Court of law could come to any but one conclusion. The facts to be collected from the case are as follows:—

1. This firm, which was an unregistered partnership firm for a special venture for dealing with castor-seeds under a contract with the East Indian Railway for one year, in 1923-24, consisted of three existing firms, one the firm of Dina Nath Hem Raj of Calcutta, who held the lion's share, namely, 8 annas, and after whose name the temporary partnership was named; a firm of Messrs. Dewan Chand and Sons of Lahore, who held a 4-annas share, and the firm of Narain Das of Cawnpore, who held the other 4-annas share.

2. The Calcutta firm started and formed the partnership and clearly financed it. The inference may fairly be drawn that it would not have come into existence without their instrumentality. They might have succeeded in inducing other firms in Cawnpore or Lahore, to join the partnership, but there is nothing to show that either the firm in Cawnpore, or the firm in Lahore, would have formed the partnership, or have become members of any such partnership if it had not been for the Calcutta firm. The Calcutta firm were therefore the moving spirit and apparently the financiers.

3. The partnership was ultimately dissolved by deed in July 1924 in Calcutta.

4. The contract with the East Indian Railway was made in Calcutta.

5. Payments for the seeds supplied, or distributed to the order of the East Indian Railway, were made to Calcutta.

6. A banking account was kept in the Imperial Bank in Calcutta.

7. The ordering and direction of the seeds, which were purchased and subsequently sold to the East Indian Railway and delivered at Manauri, took place at Cawnpore, and this no doubt was the centre of the work which has been carried out in compliance with the contract. It was not unlike a mill or factory in a country district, belonging to a firm with its head office in a neighbouring town.

8. The firm in Cawnpore, who were partners, carried on extensive operations as purchasers of the goods, which were to become the property of the whole partnership, and which were to form the source of profit.

9. The correspondence with the East Indian Railway was conducted from Calcutta.

10. There is correspondence from Cawnpore asking Calcutta for funds.

11. There is correspondence asking reports to Calcutta of the work at the local centres or branches.

12. There is correspondence asking Calcutta to make arrangements for loading wagons in Moradabad.

The test in such a matter may be given in language quoted from Mr. Sastri's excellent book on the Law and Practice of Income-tax. "Ordinarily the principal place of business of a firm or company is the place at which the persons directing the company or firm do their business." The fact that goods are manufactured in one place does not make that place necessarily the principal place of business. Where business is carried on in many places, or at different branches, it may be said that the business is carried on in each of those places, though neither of them may be the principal place of business. In our view the Income-tax Officer in particular, and to some extent the Commissioner, misdirected themselves by directing their attention to the fact that extensive business was carried on in Cawnpore. As a matter of law, we think the Commissioner has misdirected himself in relying upon the fact that an expert partner, whose importance was as great as that of any other partner, was doing the practical work in Cawnpore, and that he was at least equal, if not greater, in importance than the financing partner. We also think that he misdirected himself in the case in holding, as he appears to have held, that the fact that the Cawnpore firm were making purchases as far afield as Moradabad, affected the question whether theirs was the principal place of business. Although in the end he answers the 1st paragraph in the affirmative, he frames his finding on this point in language which is far from being convincing, saying that "it is not established that the business was not carried on in Cawnpore." He rather thinks that it is a fair inference that the business was conducted in Cawnpore. In the way in which these findings are stated, this is not a decision of the question at all. Undoubtedly a great deal, if not the bulk of the practical business, was conducted in Cawnpore. But that is not the sole, or indeed the important test in considering in a case like this, whether Cawnpore was the principal place of business.

Question (1) was intentionally framed so as to leave open the question whether the business was solely carried on in Cawnpore. But that question is now not open, and we have no hesitation in coming to the conclusion that on the facts stated in the case, there is no evidence upon which it can be held that the principal business was in Cawnpore, and that if that had been found to be the fact in a suit, this Court would have been compelled on this evidence to overrule the finding as a question of law in second appeal.

The answer to question No. (2) is 'no'. The matter should have been decided in accordance with section 64 (3).

The answer to question (3) is 'yes'.

The answer to question (4) is now superfluous; but it is clear that if the business had been carried on wholly in Cawnpore, the fact that it no longer existed would not deprive the Income-tax Officer in Cawnpore of jurisdiction to make the assessment.

We think that although the assessee has been somewhat hardly treated in this matter, he must have known that he had no business to destroy his books, while this important question of appropriate assessment was still outstanding. What effect that destruction may have upon the ultimate decision arrived at by the Income-tax authorities is a matter for them, but having regard to that circumstance we think justice will be done by ordering both parties to pay their own costs of these proceedings.

[176] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

[3rd February, 1927.]

Khushi Ram Karam Chand

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab and N.W.F. Province.

Income-tax Act (XI of 1922), Secs. 23 (4), 30 and 66 (3)—Assessee not showing an alleged income in his return—Assessment under Sec. 23 (4)—Dismissal of appeal as not maintainable—Reference to High Court—Question of law.

* (1927) 100 Ind. Cas. 774 : A. I. R. (1927) Lah. 288.

An assessment was made under Sec. 23 (4) of the Income-tax Act on the ground that the assessee failed to show in his return income received by him from a certain firm alleged by the Income-tax authorities to be owned by him but denied by the assessee. An appeal preferred against the said assessment to the Assistant Commissioner was dismissed as not maintainable. On an application by the assessee under Sec. 66 (3) of the Income-tax Act for a case to be stated to the High Court.

Held, that there was a question of law for a case, whether the Income-tax Officer legally proceeded to assess under Sec. 23 (4) and hence no appeal lay to the Assistant Commissioner.

Application [Civil Miscellaneous Petition No. 549 of 1926] under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Punjab and N. W. F. Province, to state a case for the opinion of the High Court.

Mehr Chand Mahajan, for the Assessee.

D. C. Ralli, for the Crown.

JUDGMENT.

These are two petitions under section 66 (3) of the Indian Income-tax Act praying that the Commissioner of Income-tax be required to refer the question whether the assessment of the petitioner was under section 23 (4), or one under section 23 (3) and whether the Income-tax Officer was under the circumstances justified in proceeding under section 23 (4). The petitioner was called upon to submit a return of his income. He complied with this order and submitted a return but according to the Income-tax Officer he failed to show the income received by him from the Firm of Banarsi Das Dina Nath which, it has been held, is owned by the assessee. The latter denied that the Firm existed, or that it had been carrying on business during the period in respect of which the assessment was made. No accounts relating to the income of the Firm were, therefore, produced by him.

Thereupon the Income-tax Officer proceeded to assess the Firm under section 23 (4). An appeal to the Assistant Commissioner was dismissed on the ground that no appeal lay in the case of an assessment made under section 23 (4). An application to the Commissioner under sections 33 and 66 of the Income-tax Act was rejected. At this stage it is unnecessary for us to decide whether under the circumstances the Income-tax Officer was justified in proceeding under section 23 (4) of the Act. In order to decide that question it will probably be necessary to have fuller facts before us. We are distinctly of opinion that there is a question of law involved in this case and that is, whether the Income-tax Officer legally proceeded to assess the petitioner under section 23 (4) and, therefore, no appeal lay to the Assistant Commissioner. We direct the learned Commissioner of Income-tax Act to refer the case for the opinion of the High Court under section 66 of the Indian Income-tax Act. There will be no order as to costs of these proceedings.

[177] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

[3rd February, 1927.]

Ganesh Das of Amritsar

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab and N.W.F. Province .. Referring Officer.

Income-tax Act (XI of 1922), Secs. 33 and 34—Income assessed in the hands of wrong person—Subsequent assessment on real recipient—Expiry of one year after year of assessment—Legality of assessment.

Where income derived during the accounting year 1921-1922 was assessed as the income of a firm to whom it was subsequently found by the Income-tax authorities not to belong and an assessment was made in 1926 on the person who actually received that income.

Held, that whatever might be the reason for the failure to assess any income, no action could be taken in respect of such income under Secs. 33 or 34 of the Act after the expiry of the period of limitation specified in the latter section.

Case [Referred Case No. 24 of 1926] stated under section 66 (1) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Punjab and N. W. F. Province, Lahore, with his Letter No. 505-J. M., dated 3rd/4th June, 1926, for the opinion of the High Court.

* (1927) 100 Ind. Cas. 675 : A. I. R. (1927) Lah. 248.

CASE.

The facts of this case are as follows :—

Rai Sahib L. Ganesh Das, the present assessee, is the owner of a Sugar Mill in Amritsar. For the year on which the assessment under consideration is based the mill was under lease to certain persons who carried on business therein under the name of Messrs. Amar Singh & Co. In the agreement between the present assessee and the lessees of the mill the annual consideration to be paid was fixed not at a specified cash rental but at a certain share of the net profits of the sugar business. Accordingly in his assessment order, dated the 10th March 1923, the Income-tax Officer in assessing Messrs. Amar Singh and Company treated the arrangement between R. S. L. Ganesh Das and the Company as a partnership, and refused to allow as a deduction against the income of the Company the share of the profits paid to R. S. L. Ganesh Das in return for his leasing the mill to them.

2. As a natural corollary to this action of his the Income-tax Officer when considering the personal assessment of R. S. L. Ganesh Das, did not assess that gentleman on the sum received by him from Messrs. Amar Singh and Company. In his order, dated the 28th March 1923, on the file of R. S. L. Ganesh Das the Income-tax Officer noted that the assessee's share of the profits of the Harkishen Sugar Mills had already been assessed in the assessment on the mills, and he found that there was only a small income of Rs. 1,044 from pension still to be assessed. In regard to this he noted further that, on the assurance of the assessee that in the accounting period he had paid a sum of Rs. 19,459 on account of certain losses, he, the Income-tax Officer, decided to take no steps to assess the pension income to income-tax. The Income-tax Officer made no investigation as to the alleged losses amounting to Rs. 19,459, but presumably considered that if losses to this extent were claimed, the assessee would be able to substantiate losses at least up to the amount of the income of Rs. 1,044.

3. In regard to the assessment thus made on the firm of Messrs. Amar Singh and Company two appeals were instituted before the Assistant Commissioner, one by the actual assessee Messrs. Amar Singh and Company and the other by the present assessee R. S. L. Ganesh Das. The chief point raised in both appeals was that R. S. L. Ganesh Das was not a partner in the firm of Messrs. Amar Singh and Company, and therefore a joint assessment should not have been made including in the taxable profits of the Company the portion thereof paid to R. S. L. Ganesh Das as lease money, but that separate assessments should have been made; that is to say, that from the income of Messrs. Amar Singh and Company the amount paid to R. S. L. Ganesh Das should be excluded as a business expense, and that the amount paid to R. S. L. Ganesh Das should be separately assessed in his hands. It is very clearly stated in the appeal filed by R. S. L. Ganesh Das himself in the concluding prayer that the appellant is asking that the order of the assessing officer be set aside and that the appellant be assessed on his own share of the income, that is to say, one-third of the net profits of the factory. By order dated the 30th November 1923, on the appeal of Messrs Amar Singh and Company the Assistant Commissioner took the same view as the Income-tax Officer, and dismissed the Company's appeal; but at this stage the appeal of R. S. L. Ganesh Das was overlooked no doubt owing to the fact that no assessment had been made against him, and that the order recorded in the case of Messrs. Amar Singh and Company really disposed of the petition of appeal of R. S. L. Ganesh Das also.

4. After the appeal had been dismissed Messrs. Amar Singh and Company submitted a review petition to the Commissioner on which enquiries were made and hearings given at which R. S. L. Ganesh Das also appeared as an interested party. Finally, on the 4th April 1924, the Commissioner accepted the contention of Messrs. Amar Singh and Company and of R. S. L. Ganesh Das that there was no partnership and excluded from the assessment made on Messrs. Amar Singh and Company the sums paid to R. S. L. Ganesh Das on the ground that these payments were

payments of lease money and not a partner's share of the profits. In this order my predecessor noted that as the amount paid to R. S. L. Ganesh Das would now be excluded from the income of Messrs. Amar Singh and Company, it should be taken into consideration in connection with R. S. L. Ganesh Das' personal income. About this time the Assistant Commissioner finding that the original petition of appeal submitted by R. S. L. Ganesh Das had not been disposed of by a regular order passed an order, dated the 2nd May 1924, pointing out that no assessment had been made on the personal income of R. S. L. Ganesh Das but that as it had now been decided in the case of Messrs. Amar Singh and Company that the payments to R. S. L. Ganesh Das should be excluded from the Company's income and assessed separately, it was now necessary to issue a return and take proceedings under section 34 in regard to the income of R. S. L. Ganesh Das. A mistake was here made by the assessing authorities. The income in question was that for the financial year 1921-22 which should normally have been assessed during the assessment year 1922-23, and therefore action under section 34 could only be taken within one year of the end of the financial year 1922-23, that is to say, before the 31st March 1924. The order of the Commissioner on review excluding the income from the assessment on Messrs. Amar Singh and Company was not passed till the 4th April 1924, so that at the time of passing such order it was already too late to take action under section 34. Such action was, however, taken, and I found it necessary by my order, dated the 11th November 1925, to set aside the assessment made under section 34 and to take what steps the Income-tax Act allows to assess to income-tax the income of R. S. L. Ganesh Das during the accounting period of 1921-22. I therefore took action under section 33 and after issuing a notice to the assessee as required by the proviso to that section I heard the assessee before passing an order assessing him for the period in question. The procedure that I took was to review the original order dated the 28th March 1923 passed in regard to the personal income of R. S. L. Ganesh Gas, and to substitute therefor an order containing a correct assessment as now ascertained.

It is argued by the assessee that it is now too late for any action to be taken by this department to assess his income for the year 1922-23, and it is further alleged that at the time of the passing of the Commissioner's order on review, dated the 4th April 1924, excluding the personal income of R. S. L. Ganesh Das from the assessment made on the Company, it was already too late to take any steps to assess the income of R. S. L. Ganesh Das separately. This appears to me to be a surprising contention to make. Although the assessment was originally made on Messrs. Amar Singh and Company the present petitioner himself filed a petition of appeal in regard to that assessment ending up with the request that the petitioner be assessed on his own share of the income, and when as a result of the decision on the review petition arising out of the order passed on the appeal of Messrs. Amar Singh and Company, the assessee's contention is accepted and the department proceed to assess him separately on his own share of the income as requested, it appears to be an extraordinary contention for the petitioner to make that it is now too late for the request contained in his original appeal to be complied with.

5. When in April and May 1924 proceedings were initiated erroneously under section 34 and an assessment resulted under section 23 (3) of the Act, the petitioner had a right of appeal which he duly exercised and his appeal was rejected by the Assistant Commissioner by an order under section 31, dated the 30th November 1924. In regard to the assessment upheld by that order the assessee had a right to submit a petition under section 66 (2) of the Act asking for a reference on a point of law to the High Court and such a petition under section 66 was in fact duly presented by the petitioner on the 2nd January 1925 which being the first day after the Christmas holidays was within the period of limitation allowed by section 66 (2). As a result of my order under section 33 I have entirely set aside the proceedings resulting in an order under section 31 in regard to which the assessee had a right to submit a petition under section 66 (2) and have substituted therefor another assessment order in regard to which the assessee has no right whatever to ask for a reference under section 66 (2)

as it was made under section 33 and not under section 31. It has also happened that in view of the fuller facts that came to light in the review proceedings the assessment that I have made is actually somewhat higher than that which I set aside. It therefore appears equitable to me that I should myself make a reference in this case under section 66 (1) of the Act as the assessee had lost his right to make an application under section 66 (2).

In my order, dated the 11th November 1925, therefore, I asked the assessee to send me a statement of the points of law which he considered to arise now in the case, so that I could take them into consideration at the time of making a reference. I have duly received a petition which reached my office on the 12th December 1925 containing the assessee's ideas on points of law that arise in the case. These ideas are not helpful.

6. It appears to me that the only points of law that arise in the case are the following :—

(a) "Does the Indian Income-tax Act (XI of 1922) impose any period of limitation within which the Commissioner's powers of review under section 33 in respect of an assessment proceeding must be exercised ?

(b) "If so, is the Commissioner debarred from reviewing the present case ? "

Though section 33 contains no specific provision as to limitation, it is definitely stated therein that the power of review is to be exercised "subject to the provisions of this Act." So far as other than assessment proceedings are concerned these words make the power subject to the limitation of time prescribed in section 46 (7), which deals with recovery, and in section 50, which deals with refunds. So far, however, as assessment proceedings are concerned, there are only two sections, namely, sections 34 and 35, which, for the advantage of the assessee, impose any limitation of time upon the action of an assessing authority. In both cases the only assessing authority specified is the Income-tax Officer. The question is whether the words "subject to the provisions of this Act" impose a similar limitation upon the Commissioner. In so far as income escaping assessment is concerned, I am of the opinion that it does ; for section 34 seems to me to express an intention that income that has escaped assessment for a certain period should not be liable to assessment thereafter. The contrary view would render the section to all intents and purposes nugatory, for it would be easy for the Commissioner to take action under section 33 when the Income-tax Officer was debarred from doing so under section 34. The first question therefore I would answer in the affirmative.

7. The second question, on the other hand, I would answer in the negative as section 34 applies only to income, profits or gains that "have escaped assessment," and in this case the income to be assessed did not escape assessment in the year in question. All that has occurred is that it has been assessed in the hands of an assessee to whom it was subsequently found not to belong. It can hardly, I think, have been intended that income should escape assessment simply because an error of this kind was not established till after the period of limitation specified in section 34 had expired.

With the exception of the last two paragraphs this reference was drafted by my predecessor. It has to-day been accepted by the petitioner as being correct as to the facts stated therein.

Faqir Chand, for Badri Das, for the Assessee.

Jagan Nath Aggarwal, for the Crown.

JUDGMENT.

This is a reference under section 66 (1) of the Income-tax Act. The learned Income-tax Commissioner has propounded the following questions of law :—

(1) Does the Indian Income-tax Act (XI of 1922) impose any period of limitation within which the Commissioner's powers of review under section 33 in respect of an assessment proceeding must be exercised ?

(2) If so, is the Commissioner debarred from reviewing the present case?

We have recently held in Reference No. 20 of 1926(1) that the Income-tax Commissioner's powers under section 33 are subject to the limitation imposed by section 35, and the learned Commissioner has come to the same conclusion with regard to his question No. 1. In respect of Question No. 2 he argues thus:—

"The second question, on the other hand, I would answer in the negative as section 34 applies only to income, profits or gains that 'have escaped assessment,' and in this case the income to be assessed did not escape assessment in the year in question. All that has occurred is that it has been assessed in the hands of an assessee to whom it was subsequently found not to belong. It can hardly, I think, have been intended that income should escape assessment simply because an error of this kind was not established till after the period of limitation specified in section 34 had expired."

This argument does not appear to us to be sound. Whatever may be the reason for which the Income-tax Officer should fail to assess any income within the period prescribed by law, he is not competent to assess it after the expiration of that period of limitation. So in the present case, no action could be taken in 1926 either under section 33 or 34 in respect of an income derived during the accounting period of 1921-22. After all, the Income-tax department itself is responsible for this result. The income escaped assessment so far as the person who received it was concerned.

We therefore answer the second question in the negative.

[178] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice,
Mr. Justice Beasley and Mr. Justice Srinivasa Aiyangar.*

[7th February, 1927.]

T. S. Firm, Tanjore, at Negapatam

.. Assessee.*

v.

The Commissioner of Income-tax, Madras.

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 4 (2) and 10—Firm carrying on business in British India and foreign places—Registration in British India—Test of residence—Partner's residence immaterial—Central management and control over whole business—Dual residences.

The assessee, a Chetty firm, was carrying on banking and other business through agents in various places in British India and the Straits Settlements. The partners of the firm regularly resided during the greater part of the year in Pudukottah State whence they exercised general supervision and control over the whole of the business but no business was carried on there. From time to time they came over to Madras and other Indian Branches to look into their affairs and resided for varying periods in a house in Madras belonging to them. It was found by the Commissioner that the actual profit earning operations of the firm were carried on in the Madras Presidency. On an assessment of the firm under Sec. 4 (2) of the Act on its foreign profits.

Held, that in the absence of a finding that the central management and control of the firm's business as a whole including the foreign branches was exercised from or passed through Madras or any other British Indian Branch, the firm could not be held to be resident in British India for purposes of an assessment under the Income-tax Act.

In dealing with the question of the residence of a firm for income tax purposes, the question where the individual partners have physical places of residence is a wholly irrelevant consideration.

The Swedish Central Railway Co., Ltd. v. Thompson, 9 T. C. 342; *De Beers Consolidated Mines, Ltd. v. Howe*, (1906) A. C. 455, applied.

Case [Referred Case No. 23 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Madras, in his letter No. 1516 of 1925 dated the 20th November, 1925, for the opinion of the High Court.

CASE.

I have the honour to refer the following question of law for the decision of the Hon'ble the Judges of the High Court:—

(1) *Jessa Ram v. Commr. of Income-tax*, reported *infra*.

* (1927) 50 Mad. 847 : 53 M. L. J. 249 : 39 M. L. T. 101 : A. I. R. (1927) Mad. 732 : 26 L. W. 119 : 104 Ind. Cas. 223.

"In the circumstances of this case, can the assessee, the T. S. Firm, be said to be resident in British India."

2. The assessee is a well-known Nattukottai Chetty firm of bankers, money-lenders and cloth merchants. The firm has been registered under section 2 (14) of the Income-tax Act in accordance with a partnership deed drawn up and registered at Madras on 18th December, 1922. The partners are : Chockalingam Chetty, Subbiah Chetty, Krishnan Chetty, Raman Chetty and Muthia Chetty, the descendants of the original founders of the firm. The business is carried on through agents at Madras, Rangoon, Negapatam, Pegu, Pyapon and Henzada in British India and also at various places in the Straits Settlements. Under section 64 of the Income-tax Act, Negapatam has been declared to be the principal place of business. In the assessment year under consideration, 1924-1925, a sum of Rs. 1,00,671 was remitted from Singapore and Penang to the Madras Office and was then transferred to an account called the 'Cuddalore account' kept at Madras in which the drawings of the partners are adjusted. I find as a fact and no reference has been claimed on this part of the case that the sum of Rs. 1,00,671 came out of profits of the Singapore and Penang branches of previous years. It was not the profit of the year of account, *i.e.*, of the previous year and therefore it cannot be taxed under section 4 (1) but can only be taxed under section 4 (2), *i.e.*, as profits of the previous three years arising or accruing outside British India to a person resident in British India and brought into British India in the year of account. The question on which the decision of the Hon'ble the Judges of the High Court is sought is whether in the circumstances of this case it can be held that the assessee, *i.e.*, the registered firm known as the T. S. Firm can be considered to be a person resident in British India.

3. On this question I find the facts to be as follows :—

The registered firm was created for the purposes of income-tax at Madras on 18th December 1922 by a partnership deed drawn up and registered there. The deed recites that the members of the family will carry on money-lending business in six places in British India and also abroad. The account in which personal drawings of the partners are adjusted is kept at Madras and is called the 'Cuddalore account'. The partners of the firm undoubtedly do reside for the greater part of the year at Ramachandrapuram, Pudukotta State, *i.e.*, outside British India. There they have palatial residences and from there they keep in touch with the actions of the agents and do exercise a very real control over the business. No business is carried on by the firm in Pudukotta State, the bulk of the Madras Presidency business being done at Madras itself. The agents at the various places of business work under powers of attorney which give them complete power to bind the principals and full discretion in the conduct of the business. Although the partners reside for most of the year at Ramachandrapuram and have telegraphic addresses there, they visit Madras Presidency frequently throughout the year to give oral instructions to the agents, to interview the Banks and generally to supervise the business. They also attend certain annual festivals at certain temples. I am unable to say definitely how often the partners visit Madras in the course of the year but I emphatically deny the accuracy of the allegations made in the affidavits filed before me during the hearing of the application. The partners have been in Madras much more often than is stated in these affidavits. The Ramachandrapuram press copy books which I have seen contain references to visits to Madras. Moreover while there are numerous letters to the agents at other places there are very few to Madras and none to Negapatam which indicate that the partners were visiting these places in person. I also find in their copy books references to letters written from Tirupapuliur, which show that the partners direct the business to some extent from British India. The partner who really controls the business, Raman Chetty, was in Madras for about 10 days, during the appeal proceedings, in connection with the crisis which occurred in the Chetty world about June 1925. He was also in Madras for a considerable period in the year 1924-1925 about the time of the hearing of what is known as the 'Bank case'. I also find that the partners have residences within the Madras Presidency at Madras and at Cuddalore. At Cuddalore

they have a house adjoining or situated very close to a chatram which they have built there. In this house the members of the family stay when they visit Cuddalore for certain festivals. At Madras the firm owns a house at 132-133, Coral Merchant Street, in which business is carried on. In that house the partners stay whenever they visit Madras. It was contended before me during the hearing that this building could not be classed as a residence because it is in the business part of the town and because the upstairs was formerly a godown and that if the partners stayed there they could only be said to be camping in discomfort which could not constitute residence. These allegations are incorrect. The Madras building is in a street in which many Chetties and others live. It is built in the usual residential style and the local agent and clerks do live there permanently. It has a kitchen and bedrooms and bathrooms upstairs and is an ordinary and perfectly comfortable residence according to certain standards. At the time I visited it a son of one of the partners was actually living there having come to Madras to see about the opening of new accounts. To summarise my finding of facts the T. S. Firm was registered in the Madras Presidency. It carries on business there; the business is ultimately controlled from Ramachandrapuram in an Indian State; the partners have a permanent place of residence in British India to which they can go at any time and in which they do go quite frequently.

4. On these facts an assessment was made on the firm's foreign profits on the ground that they had been brought into British India by a person resident in British India. The Assistant Commissioner, who confirmed the assessment on appeal, based his decision on the grounds that the residence of a firm must be held to be the place of the residence of the partners, that the partners could have more than one place of residence and that though they had a residence in Pudukotta State they also had a residence in Madras within the meaning of the definition of residence in section 3 (23) of the Madras City Municipal Act. I am not sure that these are the only grounds on which it can be held that the firm is resident in British India. As far as I know no legal test of residence of a firm has yet been laid down by Indian Courts and while I believe that the Assistant Commissioner's reasoning was sound, I consider that the firm could also be held to be resident in British India because the actual operations which earn the profit are carried on there, or in the language of the English cases, because the firm "keeps house and does business" in British India. I do not deny that Ramachandrapuram—the place from which the operations of the firm are chiefly directed—may be held to be the residence of the firm, but I believe that a firm like an individual or corporation can have more than one place of residence and that the place at which the firm was created for income-tax purposes by registration and at which the firm earns its profits can also be held to be the place of residence of the firm. My view seems to be supported by the decision of the House of Lords in the case of *The Swedish Central Railway Company, Limited v. Thompson*,⁽¹⁾ and by the cases cited in the judgment in that case.

5. I am therefore of opinion that the T. S. Firm is a person resident in British India on these two grounds: (a) that the partners reside here; and (b) that its profit-making operations are carried on here.

A. Krishnaswami Iyer and *M. Subbaroya Iyer*, for the assesseees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The judgment of the Court was delivered by

SRINIVASA AIYANGAR J. The question propounded for our decision is as follows:—

"In the circumstances of this case, can the assessee, the T. S. Firm, be said to be resident in British India?"

The Income-tax Acts take residence as the test which is no doubt easy enough to apply in the case of an individual but leads to difficulties when you are dealing

(1) 9 T. C. 342; (1925) A.C. 495.

either with a limited company or a partnership because, as Lord Loreburn pointed out in *De Beers Consolidated Mines, Ltd. v. Howe*,⁽¹⁾ it is artificial to talk of the residence of a company which is necessarily a metaphorical expression as "a company cannot eat or sleep though it can keep house and do business." His Lordship goes on to cite some earlier decisions and concludes thus, the earlier decisions which his Lordship holds as laying down the rule that a company resides for the purpose of income-tax where its real business is carried on and his Lordship adds: "I regard that as the true rule; and the real business is carried on where the central management and control actually abides." The question was carried further in the case of *The Swedish Central Railway Company, Ltd. v. Thompson*⁽²⁾. There the contention was that a company could have more than one residence because the central management and control might be divided between two places of business, so that a company could be said to have two residences. I cite a passage from the judgment of Viscount Cave, the last paragraph of page 501: "The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of income-tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence; see *Cooper v. Cadwaladar*⁽³⁾ and in principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence." If therefore it can be shown that the central management and control of a company or partnership, by which words I understand the management and control of the whole of its business, was divided between two localities, each of them may be said to be a residence of the company for the purposes of the Income-tax Act. But I read the learned Lord Chancellor as emphasizing the words "central management and control," by which I understand that the suggested second residence must not merely have a delegation of management of some portion of the partnership business, however extensive, but a delegation of some portion of the management of the business as a whole. With these considerations to guide me I approach the Commissioner's findings of fact in this case. Unfortunately he had directed himself to the view that what he was largely concerned with was the question of where the individual partners actually had physical places of residence and part of his reasoning, at any rate the finding that the concern was assessable at Madras, was because the partners from time to time came over to Madras to look into the affairs of the Madras branch, or perhaps of all the branches in British India and resided in a house in Madras belonging to the firm in Coral Merchant Street for varying periods. That in my opinion is a wholly irrelevant consideration. The firm for the present purposes may be considered to have had three classes of activities. In Ramachandrapuram the partners regularly resided in what the Commissioner calls palatial residence and there exercised a general supervising and directing power over the whole of the business. Secondly, it has many branches in British India, which, I think he means to suggest, were generally controlled from Madras. Finally, there are branches entirely outside British India, in the Malay States and elsewhere and it is with the profits earned in these branches that we are concerned in this case. Had it been found as a fact that the control of the whole business, that is to say, the business including the branches outside British India, was exercised both from Ramachandrapuram and Madras, it may very well be that the principle of *The Swedish Central Railway Company's case*⁽²⁾ would apply and that the central management of the business as a whole might be considered to be split up between Ramachandrapuram and Madras. I cannot see anything in the findings to give the slightest colour to any suggestion of the kind, or to hint that any part of the control of the overseas branches even passed through the Madras or any other branch in British India. In these circumstances I am of opinion that the question propounded to us must be answered in the negative.

(1) 5 T.C. 198; (1906) A.C. 455.

(2) 9 T.C. 342; (1925) A.C. 405.

(3) (1904) 5 T.C. 101.

It was suggested in the course of the argument that the case might be sent back for fresh findings of fact in view of the observations of this Court and the test laid down by us. I cannot accept such a course because I think that the findings of fact must be taken to be complete and, though no doubt the Commissioner's mind was not applied to the exact point to which we think it ought to have been applied, I cannot doubt that, if any evidence had been available as to any kind of management or supervision being exercised from British India over the overseas branches, the Commissioner would have stated it as supporting his case and set it out.

The Commissioner will pay the assessee's costs of this reference. Fees, Rs. 250.
My learned brothers have seen this judgment and concur in it.

[179] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

*Before Sir George Rankin, Kt., Chief Justice, Justice Sir C. C. Ghose, Kt.
and Justice Sir Philip Buckland, Kt.*

[15th February, 1927.]

Ram Kissendas Bagri

.. Assessee.

v.

The Commissioner of Income-tax, Bengal

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 22 and 23—Submission of return not properly filled in—Notice to produce accounts—Assessment under Sec. 23 (4) on estimate—If proper—Scope of Sec 22 (4).

The assessee served with a notice under Sec. 22 (2) wanted time for compliance therewith, whereupon he was further required under Sec. 22 (4) to produce his accounts by the 30th July, 1925. On the 12th August a form of return in form I. T. 11 was filed but no figures were shown therein, the word 'nil' being shown against every item except item 5 against which the word 'loss' was shown, and the entry 'loss' made against the space for total. This form which was returned by the Income-tax Officer for properly filling it up was not represented by the assessee. The Income-tax Officer made an assessment under Sec. 23 (4) based on the estimate of the Calcutta income arrived at as a result of the examination of the Calcutta accounts, and on the figure reported by the Income-tax Officer, Madras, in the absence of Madras accounts.

Held, (1) that the document filed on the 12th August was not a return within the meaning of Secs. 22 and 23 of the Act; and

(2) that having regard to the fact that the assessee failed to comply with the notice to produce accounts, the assessment under Sec. 23 (4) was justified and the fact that the Income-tax Officer took the Calcutta income from the account books and accepted a mere report from the Income-tax Officer, Madras, would not render his proceeding under Sec. 23 (4) improper.

Under Sec. 22 (4) the Income-tax Officer is empowered to serve notice to produce accounts independently altogether of any question of the making of the return.

Case stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

CASE.

In accordance with the provisions of section 66 (2) of the Indian Income-tax Act, I have the honour to refer for the decision of the Hon'ble High Court certain questions of law which arose out of the assessment made on Messrs. Ramratandas, Brijratandas and Chandratandas Bagri carrying on business under the name and style of Ramkissendas Bagri.

2. The facts in this case are as follows :—A notice under section 22 (2) Income-tax Act was issued on the assessee, a firm by the name of Ramkissendas Bagri calling upon them to submit a return by the 14th of June, 1925. About the same time an enquiry was addressed to the Income-tax Officer, Madras, asking for a report of the income during the previous year of the Madras Branch of the firm. On the 15th of June the assessee filed a petition for an adjournment stating therein that "our account books are not yet closed owing to the absence of our Gomastha, and the proprietor also is not here." The previous year of the firm having ended in Dewali 1981 Sambat which corresponds to September—October, 1924 the Income-tax Officer refused to allow an adjournment of three months as asked for, but issued a notice on the assessee under section 22 (4) calling upon them to produce their accounts on the 30th of July.

On the 30th of July the assessee was not ready and applied for 10 days time when the Income-tax Officer adjourned the case to the 12th of August.

3. On the 12th of August a form of return in Form I. T. 11 "Form of return of total income for individuals, firms and Hindu Undivided Families under section 22 (2) of the Indian Income-tax Act, 1922", was filed but no figures were shown therein. On page 1 of the form 'nil' was shown against every item except item 5, against which the word 'loss' was shown, and against the space for total the entry 'loss' was also made. The return required by note 5 on page 2 of the form from assesseees who keep accounts on the mercantile accountancy or book-profits system was not filled up. Accordingly the Income-tax Officer endorsed on the form 'returned for properly filling up the form and for re-submission' and sent it back to the assessee.

4. On the same day Calcutta accounts having been produced the Income-tax Officer took up the examination of them which continued until the 14th of August when the Income-tax Officer directed the assessee to produce among other things the Madras accounts and adjourned the case till the 19th of August. Further adjournments were made from time to time until the 25th of August when the form of return in I. T. Form 11 not having been returned properly filled up and the Madras accounts not having been produced, the Income-tax Officer made an assessment on estimate under section 23 (4). The estimate of the Calcutta income was based on the figures arrived at as the result of the examination of the Calcutta accounts and in the absence of the Madras accounts the figure reported by the Income-tax Officer, Madras, on the 13th of July was adopted. The total income having been thus arrived at, the assessee was assessed to super-tax as an unregistered firm and a deduction of only Rs. 50,000 was allowed in arriving at the income assessable to super-tax.

5. It will be convenient to note here the following extract from the report received from the Income-tax Officer, Madras. "The agent of the firm Ramkissendas Chandratandas states that the account books have been sent to Calcutta. Please have the books examined there", and also the order recorded by the Income-tax Officer, Madras, when the agent of the firm appeared before him on the 10th July: "Hanuman-das Vitaldas, agent of the firm of Ramkissendas Chandratandas appears without accounts. He says that the accounts for the previous year have been sent to Calcutta which is its principal place of business. He says that the books are every year sent to Calcutta as soon as the year is over and requests that the books may be got examined by Income-tax Officer, Calcutta. Write to Income-tax Officer, Calcutta, and inform him that the books have been already sent to Calcutta and they may therefore be got examined there as in previous years. Also send copy of Surveyor's report along with the letter."

6. On the 16th of September the assessee filed an application under section 27 for cancelling the assessment. Paragraph 1 of the application runs as follows: "That I submitted return on 12th August, 1925 which was returned on that very day by your honour for filling it up properly which was not done by me because I was under the impression that when my books are being examined by your honour it would not be necessary to file the same." There is no claim in the petition that the Madras books had not then reached Calcutta and so could not be produced. There was some delay in dealing with the application under section 27 because the Income-tax Officer went on leave and there was some doubt regarding the order he had passed, but finally on the 8th of December after hearing the pleader the Income-tax Officer rejected the application under section 27.

7. On the 6th of January, 1926 an appeal was filed in I. T. Form 3 against the refusal to re-open the case, before the Assistant Commissioner of Income-tax, Calcutta, and it is important to notice that paragraph 2 of the form of appeal as submitted by the assessee runs as follows: Your petitioner was prevented by sufficient cause from making the return required by section 22... had not a reasonable opportunity to comply... with the terms of the notice under sub-section (4) of section 22... as more particularly specified in the statement attached. In the statement attached it was said that while the assessee had actually made

a return on the 12th of August the Income-tax Officer had returned the form to have it properly filled up though the petitioner had explained the difficulty of so doing in the absence of the Madras accounts which the petitioner alleged had actually been sent to Calcutta on the 24th of September. On the 15th January, 1926 the appeal was rejected, the Assistant Commissioner holding that the assessee had failed to produce all the books of accounts as required by notice under section 22 (4).

8. I am asked however in the event of my declining to interfere in review, to refer certain questions of law to the Hon'ble High Court. The questions stated by the assessee are as follows :—

(i) Whether return under section 22 (2) of the Act having been actually made and submitted to the Income-tax Officer on requisition as per notice in said behalf prior to assessment, the Income tax Officer had jurisdiction to send back the return to the assessee as not completely filled in and then to make an assessment under section 23 (4) without himself complying with the requisition of law, namely, by issuing a notice under section 23 (2) calling upon the assessee to produce evidence in support of the return that had been submitted by him under section 22 (2).

(ii) And the above issue in law having been raised in the appeal, whether the Assistant Commissioner failed in his jurisdiction by not trying and deciding on the same?

(iii) Whether on the admitted fact of Calcutta income having been ascertained from examination of Calcutta accounts produced pursuant to requisition of law in that behalf and Madras income having been ascertained by acceptance of Madras report, the Income-tax Officer was wrong or not in making the assessment under section 23 (4) and not under section 23 (3).

9. Questions (i) and (iii) only are referred in the following form :—

(1) Is the document in Form I. T, 11 that was filed on the 12th of August, 1925 a return within the meaning of section 22 and section 23 of the Indian Income-tax Act?

(2) When an assessment is made partly on an examination of accounts and partly on the basis of an estimate reported by another Income-tax Officer under section 64 (4) in the absence of accounts called for under section 22 (4), is the assessment to be made under section 23 (4) or 23 (3)?

For in my opinion if the document filed was in law a return within the meaning of sections 22 and 23 of the Income-tax Act, then the Income-tax Officer had no right to return it or to make an assessment without first issuing a notice under section 23 (2) and the assessment made must be cancelled and redone. - Question (ii) as stated by the assessee does not arise because in the appeal before the Assistant Commissioner the appellant admitted that he was prevented by sufficient cause from making the return required by section 22 (2). And therefore question (i) was not before the Assistant Commissioner. Hence question (ii) contains a misstatement of fact and cannot be referred as arising out of the appellate order referred to.

10. Under section 65 (2) I am required to state my own opinion on the question referred. Regarding the first question, namely, whether the document filed on the 12th of August was a return within the meaning of section 22 and section 23 of the Indian Income-tax Act, my view is that as the return mentioned in section 22 (2) is to be "in the prescribed form and verified in the prescribed manner setting forth along with such other particulars as may be provided for in the notice the person's total income during the previous year", and as the total income was not set forth and as the details required by the prescribed form, especially those required by note 5, were not furnished, the document was not a return within the meaning of section 22 of the Act.

11. As regards the second question my opinion is that the assessment must be under section 23 (4) whether a return has been filed or not. If no return has been filed the assessment will be under section 23 (4) for that reason. If a return has been filed, but the assessee has failed to comply with all the terms of the notice under section 22 (4) and to produce the accounts of the place for which an estimate has been submitted, then the assessment will be under section 23 (4).

JUDGMENT.

RANKIN C. J. :—This is a reference under section 66 (2) of the Income-tax Act of 1922.

Two questions are propounded to us by the letter of reference as arising out of the facts disclosed therein. The first question is whether a certain document which was filed on the 12th of August, 1925 is a return within the meaning of section 22 and section 23 of the Act, and the second question is whether when an assessment is made partly on an examination of accounts and partly on the basis of an estimate reported by another Income-tax Officer under section 64 (4) in the absence of accounts called for under section 22 (4), the assessment is to be made under section 23 (4) or 23 (3).

The facts are shortly these : The assessees are members of a joint Hindu family and proprietors of a business. On the 11th of May, 1925 a notice was sent to them under section 22 (2) to make a return by the 14th of June, 1925. It appears that the method of account adopted by the firm was to keep its books from Dewali to Dewali and that the previous year for which the tax had to be assessed came to an end about October 1924. On the 15th of June the assessees wanted further time but on that day a notice was issued under sub-section (4) of section 22 upon the assessees to produce their accounts by the 30th of July. In the meantime steps were being taken through the Income-tax Officer in Madras to ascertain the state of the branch business in Madras and it would appear that the assessees were maintaining that the Madras books had been sent to Calcutta. Calcutta being the principal place of business, it was quite proper for the assessment to be arrived at by the Income-tax Officer in Calcutta. On the 30th of July the accounts were to be examined but the assessees were not really ready with the accounts and the matter had to be adjourned to the 12th of August.

On the 12th of August what happened was that the document which is now in question was filed or lodged by the assessee with the Income-tax Officer but on the same day it was returned for properly filling up the form and re-submission. The document was taken back and the assessee in his application in the course of this matter has explained that he did not comply with the requisition to make a return. He does not pretend that he filled it up properly. He says that he did not fill it up properly and relodge it, because he was under the impression that it was unnecessary since his books would be examined. He definitely says " your petitioner was prevented by sufficient cause from making the return required by section 22. "

Now, the question arises, if it was a return, ought not the Income-tax Officer to have insisted upon the procedure laid down in clause (2) of section 23, namely, should he not have served the assessee with a notice requiring him to attend and produce any evidence he might have in support of the return.

The question that is put to us is put in a form which is a little misleading because it is much too abstract. It is quite clear to my mind that clause (2) of section 23 does not prescribe the proceeding that is really applicable here. It was not a question of this return being accepted as a return and evidence being required in support of it. The position was that no real attempt to state the total income of the assessee for the previous year had been made and the form was returned on the ground that it was not in any sense an attempt to comply with the requirements of section 22 and the assessee had acquiesced in that position.

In my judgment, therefore, the answer to the first question is this : that the document in Form I. T. 11 which is referred to in the first question was not in the circumstances of this case a return. It was not taken or given as such, and the assessee accepted the position that he had not made a return under section 22.

With regard to the second question, the position is reasonably plain. By clause (4) of section 22 the Income-tax Officer is empowered to serve notice to produce accounts independently altogether of any question of the making of the return. As long

as notice has gone under clause (2) of section 22 the Income-tax Officer is entitled to call for the accounts. In this case the Madras accounts—part of the accounts—were not furnished though ample time was given for the purpose ; and in my judgment, in these circumstances the Income-tax Officer was entitled to act under clause (4) of section 23. He had to make the assessment to the best of his judgment, but because it turns out that in his desire to do his best he has made an assessment taking the Calcutta figures from the books and accepting for this purpose a mere report from Madras by the Income-tax Officer, it is suggested that that has rendered his proceeding under sub-section (4) improper and that he really should have proceeded under sub-section (3) of section 23. In my judgment there is nothing in that point. Under sub-section (4) the Income-tax Officer is entitled to assess to the best of his judgment and is in no way bound to confine himself to any special kind of materials in coming to his decision.

In my judgment, therefore, the question which is propounded to us as the second question should be answered by saying that having regard to the fact that the assessee failed to comply with the notice to produce accounts, the Income-tax Officer was justified in acting under clause (4) of section 23.

The assessee must pay the costs of this reference. Such costs must be taxed by the Taxing Officer.

GHOSE J :—I agree.

BUCKLAND J :—I agree.

[180] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Justice Sir C. C. Ghose and Justice Sir Philip Buckland, Kt.

[17th February, 1927.]

Behari Lal Mullick

.. Assessee.*

v.

The Commissioner of Income-tax, Bengal

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 3 and 9—Income from property—Source of income non-existent in year of assessment—Validity of assessment on previous year's income—Interest due under mortgage but not paid—If allowable as deduction.

An assessment for the year 1924-1925 on income derived from ground rent of *bustee* lands received by the assessee in the previous year 1923-1924 is valid, though in the year of assessment the assessee derived no income whatever from that source. Though the present tense is used throughout Secs. 9 and 10 of the Act, the sections are to be applied to the state of facts in 'the previous year', or in the case of an exceptional assessment under Sec. 25 (1), a completed portion of the year of assessment.

On an assessment of income derived from property interest due under a mortgage over the property but not actually paid is an allowable deduction under Sec. 9 (iv) of the Act.

Case stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

CASE.

In accordance with the provisions of section 66 (2) of the Indian Income-tax Act I have the honour to refer for the decision of the Hon'ble High Court certain questions of law which arise out of the assessment made on Babu Behari Lal Mullick by the Income-tax Officer, District No. 4, Calcutta.

2. The facts of the case are as follows :—

(a) On the 9th July, 1924, the assessee Babu Behari Lal Mullick filed a return of his income for the Bengali year 1330 showing income from property which is assessable under section 9, Act XI of 1922, and from ground rent which is assessable under section 12 of the same Act. The ground rent was realised from *bustee* lands. On the 19th January 1925 an order was passed under section 23 (3) of the Act assessing his total income from these two sources and determining the sum payable by him on the basis of such assessment.

* (1927) 31 C. W. N. 557 ; A. I. R. (1927) Cal. 553.

(b) On the 26th of February, 1925, the assessee filed an appeal before the Assistant Commissioner, Calcutta, objecting to the assessment on the ground (among others) that as both the house property and the *bustee* lands in question had been sold by a decree of the High Court on the 16th of August, 1924 before the assessment was made, the assessee had no source of income at the time of the assessment, and therefore, was not assessable to income-tax, even although he had an assessable income under these particular heads in the previous year. At the hearing of the appeal another point was raised, *i.e.*, that both the house property and the *bustee* lands were subject to a mortgage and that the amount of the interest on such mortgage should have been allowed in respect of the income from both sources even although in point of fact the interest on the mortgage had not been paid.

(c) On the 31st March, 1925 the Assistant Commissioner by his order on the appeal overruled these objections. He held that under section 3 of the Indian Income-tax Act, XI of 1922, the possession of a source of income at the time of assessment was not necessary to render an assessment valid provided that the assessee had actually derived income from that source during the previous year. He also held that payment of interest on a mortgage has to be proved before any deduction on account of such interest can be allowed.

3. The party has now asked for a reference to the Hon'ble High Court under section 66 (2) of the Income-tax Act of two questions of law which he states as follows :—

(1) Is an assessment for a year valid in law when the source of income is non-existent in that particular year? Is not section 3 itself a bar to making an assessment in such a case? Is not the phrase 'of which he is the owner' in section 9 a bar to making an assessment in the case of house property?

(2) Is an amount of interest due on a mortgage debt but not actually paid, an allowable item of expenditure under head 'House property income' under section 9 of the Act?

4. The first question involves a discussion of the basis of liability to income-tax under the Indian Income-tax Act, XI of 1922. On the general question the applicant claims that law in force in England applies in India and relies on the decision in the case of *Brown v. National Provident Institution*(1) in which it was held, that "on the general scheme of the Income-tax Acts it is clear that an assessment for any year requires a taxable subject-matter in that year though the conventional value of the income from that subject-matter may be measured in the first instance by the average income of previous years." In addition in the particular case of "property" he relies on the expression "of which he is the owner" in section 9 (1) of the Income-tax Act as showing that in respect of "Property" at any rate no assessment can be made under section 9 unless the assessee is the owner of the property at the time of the assessment.

5. The general claim of the assessee that the Indian Act must be interpreted in accordance with an English ruling on the English Income-tax Law cannot be admitted unless he shows first of all that the basis of the Indian Income-tax Act is the same as that of the English Income-tax Act, and he has made no attempt to do this. Consequently the question must be decided by an examination of the provisions of the Indian Income-tax Act, and for this purpose I invite the attention of the Hon'ble High Court to the provisions of section 3 of the Indian Income-tax Act which are as follows :—

"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals."

(1) (1921) 2 A. C. 221; 8 Tax. Cas. 57.

It will be noted that there is no reference at all in the section to the existence of a source of income in the year of assessment. On the other hand it is clearly stated that 'tax shall be charged for that year (*i.e.*, for the year of charge) in respect of all income, profits and gains of the previous year.' What is essential therefore is not that there shall be income, profits and gains in the year of assessment but that there shall be profits and gains in the previous year. Accordingly Sastri in page 31 of his Edition of Indian Income-tax Act explains the law as follows :—

"Section 3 taxes a person in respect of his previous year's income without regard to the question what sources of income he has, or whether he has any income or source of income in the year of assessment. The criterion according to which the liability to income-tax and the amount of the liability in a year are ascertained is the total income of the individual from all sources for the previous year. In short, the profits of the previous year are the measure and the ground of liability. The position of the assessee in the year of assessment, provided he is alive, is wholly immaterial. A person without any income and without any source of income in the year of assessment, even an adjudicated bankrupt, may be liable to income-tax. The section provides for taxation of a simply retrospective nature in respect of the profits of the preceding year not had recourse to by way of measure but charged as subject-matter."

This basis of taxation, I may add, was deliberately adopted when Act IX of 1922 was passed. For under section 14 (2) of Act VII of 1918 income-tax was levied *in respect of each year in respect of the taxable income in that year*. But the Statement of Objects and Reasons relating to the Bill which became Act XI of 1922 states specifically that "the Bill.....provides for the tax at the rates sanctioned for any year being assessed finally *on the income of the preceding year*."

6. The general position regarding the liability to assessment under the Act of 1922 is not modified in the case of 'property' by the words 'of which he is the owner' appearing in section 9. These words are not meant to stress ownership at the time of assessment as opposed to non-ownership at such time but to stress the fact that only the owner of a property can be assessed under section 9. The tenant or the lessee who does not possess rights of ownership is to be assessed not under section 9 but under whatever other section is applicable—under section 10 if he makes a business of taking property on lease and subletting it, or under section 12 if that is not his business.

7. In the circumstances my opinion on the first question of law submitted by the applicant in this case is that an assessment in any year in respect of an income derived from any source (whether from 'property' or from anything else) which was in existence in the previous year is valid and legal under section 3 of Act XI of 1922, even if the assessee was not in possession of that source of income during the year of assessment.

8. The answer to the second question depends upon the interpretation to be placed on the wording of sub-clause (iv) of section 9 (1). The assessee lays stress on the fact that in both sub-clause (iii) and sub-clause (v) of section 9 (1) the word "paid" has been included, whereas in sub-clause (iv) there is no such word. He argues accordingly that under sub-clause (iv) an allowance is to be made in respect of interest due on a mortgage on 'property' irrespective of whether the interest has been paid or not. This is not the interpretation placed on the section by the Central Board of Revenue. For in paragraph 29 of the Notes and Instructions, printed at page 85 of the Income-tax Manual, it is stated that the allowance specified in sub-clause (i) and sub-clause (ii) of section 9 (1) "is a fixed allowance which should be granted without proof of actual expenditure in any year and irrespective of the amount of such expenditure. The allowances on account of the annual premium paid to insure the property against risk of damage or destruction or on account of interest on mortgage or annual charge or ground rent or land revenue or of collection charges must, however, be supported by proof of the actual expenditure." In practice what is done is that these charges are only allowed when proof of payment is produced,

but if an assessee shows that he keeps his account on the mercantile accountancy system, *i.e.*, not on the basis of actual receipts and payments but on the basis of receipts due and payments due, then the assessee is given the benefit of the amount entered in his accounts as due on account of interest on mortgage. In this case, however, the assessee is not entitled to this concession because he has specifically claimed throughout that his income should be assessed on the cash basis system, *i.e.*, on the basis of actual receipts and actual payments and not on the basis of the amounts receivable and payments due and the original assessment made on his income from *bustee* lands has been revised in accordance with this claim. There is nothing to show that these instructions and this practice are not in strict accordance with the law and that the omission of the word "paid" in section 9 (1) (iv) was intentional, *i.e.*, that the intention of the legislature was that the owner of "property" should be allowed in all cases a deduction on account of the interest on mortgage, or of a charge or ground rent irrespective of whether the amount has been paid or not paid. Nor is there any unfairness in this interpretation of the section. For in practice when accumulations of interest are paid a deduction of the whole amount so paid is allowed. My opinion therefore on the second question of the assessee is that it should be answered in the negative.

M. N. Kanjilal, for the assessee.

Langford James and *H. R. Pankridge*, for the Crown.

JUDGMENT.

RANKIN C. J.—This is a reference made under section 66 of the Indian Income-tax Act of 1922 by the Commissioner of Income-tax, Bengal.

Two questions are referred to us and I will take them separately.

The first question is as follows: "Is an assessment for a year valid in law when the source of income is non-existent in that particular year? Is not section 3 itself a bar to making an assessment in such a case? Is not the phrase "of which he is the owner" in section 9 a bar to making an assessment in the case of house property?"

The assessment in the course of which this question of law arises was the assessment made upon one Behari Lal Mullick for the income-tax year 1924-1925. The assessee was a house property and land owner living apparently at 8, Durgo Nerain Tagore Street in Calcutta, a dwelling-house in which he had a one-third share. The "previous year" with which we have to deal is 1923-1924 and the assessee in his "statement of total income during the previous year" declared the amount of profits or gains or income during the previous year as having accrued to him from two sources numbered respectively 4 and 9 in the form provided by Rule No. 19 of the Rules made by the Board of Inland Revenue under section 59 of the Act. In respect of "property" as shown in detail in Schedule A he declared the income to have been Rs. 3,116. Two items of property are included in this: (a) certain house property at 191, Harrison Road which was let out to tenants and for which in 1923-1924 the assessee actually received as rent Rs. 3,900; and (b) the dwelling-house in Durgo Narain Tagore Street, the annual letting value being put down as Rs. 1,724. These two items when certain deductions have been made account for the figure Rs. 3,116. The source No. 9 in the form was declared to have yielded in 1923-1924 an income of Rs. 8,306. This was ground rent received by the assessee for certain *bustee* lands at 14 Machuabazar Street let out to tenants.

The claim made by the assessee was that the house property at Harrison Road and the *bustee* lands at Muchuabazar Street had been mortgaged by him and that although in the "previous year" *i.e.*, 1923-1924 he had derived income therefrom as aforesaid, he had in the year of assessment *i.e.*, 1924-1925 received no income therefrom in fact by reason that a mortgage suit had been brought against him and the properties were sold on the 16th of August, 1924. He claimed accordingly that in 1924-1925 he had no source of income and was not liable to be assessed for the income-tax year 1924-1925.

The learned Advocate who appears before us on behalf of the assessee contends in effect that the principle of the decisions under the English Income-tax Acts in *Brown v. National Provident Institution*,⁽¹⁾ and *Whelan v. Henning*,⁽²⁾ are applicable to the Indian Income-tax Act of 1922 with the result that if an assessee has no income in the year of assessment from a particular source, no income-tax is due from him notwithstanding that in the "previous year" he did, in fact, derive an income from that source.

The Income-tax authorities who have dealt with the case do not appear to have examined into the facts or come to a final and definite conclusion as to whether in respect of (a) the dwelling house, (b) the house property, or (c) the *bustee* lands the assessee is really entitled to say that he had no income whatever in the year of assessment. They reject the contention that the principle of *Brown's* case⁽¹⁾ applies to the Indian Act of 1922 and at the request of the assessee have referred this question to the Court framing it at the assessee's request in the terms stated above.

Ordinarily a case for the opinion of a court of law should be stated on the basis of a careful finding of facts. In this way only is it possible to avoid the raising of questions academic or misleading, and in this way only is it possible for a court of law to deal usefully or correctly with any questions of law. In the present case, however, it is apparent from the form of the return prescribed by Rule No. 19 that on the view taken by the Income-tax authorities they are not bound or entitled in any year of assessment to make an enquiry into the income of any year save the "previous year" and that they cannot be called upon to conduct an enquiry into the income of two years with a view to ascertain what sources of income persisted throughout both the years.

Learned Counsel for the Board of Inland Revenue is anxious to have a determination from us upon the question whether the principle of *Brown's* case applies⁽¹⁾ in India under the present Act and he is prepared to admit with reference to this particular assessment upon this particular assessee whatever facts are necessary to raise this highly important question. I will assume accordingly, to take the clearest case, that whereas in the "previous year" *i.e.*, 1923-1924 the assessee received an income from ground rent of the *bustee* lands he has in the year of assessment derived no income whatever from that source.

For the purpose of understanding the law upon this question under the English Acts prior to the Finance Act, 1926, it makes no difference whether we examine the Act of 1842 (5 and 6 Vict. Chap. XXXV) or the Act of 1918 (8 & 9 Geo. 5., Chap. IV). Upon a true construction of either Act the tax for each income-tax year was charged upon the income of that year. The assessee had to make his return and the assessment upon him had to be made at a time when a large portion of that year had still to run. To ascertain the amount of future receipts many rules were provided. What the assessee in England had to return as the true figure upon which he was liable to pay was a notional or statutory income computed with reference to different sources in different ways and with reference to any one source in a way which might depend upon special circumstances. Save in one special type of case (which may be shortly referred to as Case 3 of Schedule D) it never was—and on the face of the English Statute it could not well be—doubted that the statutory income upon which assessment in any particular year was made was an income which the Legislature deemed the assessee to have received in the year of assessment. On the words of the English Acts it is in almost every case as plain as express language can be that the Legislature imputed the statutory income to the assessee by way of computation or measurement of his income for the year of assessment. Accordingly the English Acts and the rules of computation which they applied to the various possible sources of income were construed upon the principle that in no year of assessment did the Legislature intend to impose the tax in respect of income derived in previous years. If in the

(1) (1921) 2 A. C. 222; 8 T. C. 57.

(2) (1926) A. C. 293; 9 T. C. 263.

year of assessment the assessee had derived some income from a particular source the amount for purposes of taxation might have to be computed at least provisionally by reference to his income from that source in one or more of the years immediately preceding. If, however, the assessee in the year of assessment derived no income from a source which in the previous years had yielded income the statutory rules as to computation of the present and future by reference to the past did not apply so as to impute to the year of assessment an income which did not exist at all. The basis and subject-matter of the tax was the income in the year of assessment. As a matter of law this is true because it is the true construction of the English Statutes and for no other reason. In *Brown's* case⁽¹⁾, Rowlatt, J. put this matter in the simplest words: "There is no doubt that the general scheme of the income-tax is that it is payable in respect of a source of income existing in the year of assessment, though the amount is often measured by the results of previous years."

The contention of the Board of Inland Revenue before us upon this reference is that in 1922 the Indian Legislature, which in previous Income-tax Acts had clearly followed the English Acts in the general scheme and in the principle of putting the tax upon the income derived during the year of assessment, intentionally departed from that principle and determined in each year to levy the tax not upon the income of the year of assessment *i.e.*, the current year whereof a part is unexpired at the time of assessment but on the income of the previous year; and that under the Indian Act of 1922 the income of the previous year appears not as a standard by which the next year's income is to be computed, nor as a measure, nor as an element in an average, but as being itself the subject-matter of the tax. However familiar one may be as lawyer or as patient with the English principles one cannot profess in either capacity that there is anything absurd, impossible or unjust in levying income-tax upon the actual receipts of a completed year in the year which follows. One can see readily enough that there may be grave difficulties in changing from the one system to the other, difficulties too in combining taxation of a simply retrospective nature in respect of the profits of the preceding year with a system of deduction at the source in the year of assessment at the rate imposed for that year; also that, as Rowlatt, J. pointed out in the case already cited at page 511, "a postponed tax like this has the inconvenience of letting the tax-payer go in the year when he has the income, and taxing him when he has parted with it, perhaps by bankruptcy, or of losing the tax altogether when the tax-payer has escaped by death." It may be, on the other hand, that the Indian Legislature has seen its way to impose the income-tax directly upon actual receipts to get rid of notional or statutory incomes altogether, to avoid so far as possible the labour of subsequent adjustment and the inconvenience of refunds of tax by a scheme which gives to the tax-payers or at least to some tax-payers a substantial time between the end of the year the income of which is charged and the time at which they are required to pay.

These considerations, of course, are for the Legislature, and the only question for the Court is as to the meaning of what the Legislature has said. I refer to them, in the first place, because they are matters on which it is specially necessary that the Income-tax Act of 1922 should be carefully scrutinized and, in the second place, because it is desirable to notice that until it is first decided whether or not the tax is a retrospective tax on the past year nothing can be gained by the reflection that the income-tax is a tax on income, or that a non-existent income cannot be charged or made to yield revenue. There is, however, one principle often appealed to in the English cases which is even more clearly applicable to the Indian than to the English Acts, namely, that the income-tax is one tax and not an aggregate of different taxes.

For the present purpose the proper starting point is the Indian Income-tax Act (VII of 1918). By section 14 sub-section (2) it was provided that "there shall be levied in respect of the year beginning with the first day of April, 1918, and in respect of each subsequent year, by collection in that year and subsequent adjustment as

(1) (1919) 2 K. B. 497 at p. 509.

hereinafter provided, income-tax upon every assessee in respect of his taxable income in that year at the rate specified in Schedule I" The amount of the taxable income of an assessee was determined by the machinery described in section 17 which provided for a return to be made in a prescribed manner of the total income during the previous year. By section 18 the Collector, if satisfied that such return is correct and complete, was directed to assess "the sum payable by the assessee for the year in which the return is made on the basis of such return" By section 19 when the Collector had ascertained the total income actually received by or accrued to the assessee in the previous year, he was to compute the income-tax which would have been payable if it had been levied in such previous year with reference to the amount of the income so ascertained and the law then in force; and the difference between the sum so computed and the aggregate of the sums already paid by or on behalf of the assessee in respect of income-tax for such previous year was to be paid by or refunded to the assessee. This system of adjustment involved a running account between the Government and the tax-payer, a provisional assessment being first made on the income of the preceding year and the assessment being adjusted and corrected when the income in the year of assessment had been ascertained. There can, therefore, be no doubt that the tax was laid upon the income of the year of assessment and the principle affirmed in *Brown's* case was given full effect. Sections 5 to 11 inclusive correspond roughly to the Schedules of the English Acts. They state the classes or heads of income to which the Act applies and make provision in respect of each for specific allowances or exclusions.

Now, the Act of 1922 (XI of 1922) purports to consolidate and amend the law relating to income-tax and super-tax. Strictly speaking, it does not of itself impose the tax at all. This is to be done by the Finance Act of the year. Section 7 of the Finance Act (XII of 1922) provides: "Income-tax for the year beginning on the first day of April, 1922, shall be charged at the rates specified in part I of the Third Schedule", and specifies that "total income" in this Schedule means "total income" as defined in clause (15) of section 2 of the Indian Income-tax Act, 1922. The Third Schedule gives rates of income-tax specifying different rates: When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000; when the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000; and so forth: in other words, it provides a graduated scale according to the amount of the "total income". Provision having been made by the Finance Act in this manner, section 3 of the Income-tax Act is attracted. Section 3 is as follows: "Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, company, firm and Hindu undivided family." It will be noticed that the tax to be charged "for" any year is "in respect of" the income of the previous year. Sections 6 to 12 have the same function as sections 5 to 11 in the Act of 1918. They state the heads of income which are chargeable and authorize specific allowances or exclusions. It will be observed that the words "total income" which occur in the Finance Act are defined as the total amount of income, profits and gains from all sources to which this Act applied computed in the manner laid down in section 16 and, it is clear that section 16 which deals with certain specific exemptions, has meaning only with reference to the amount of the income of the "previous year." Section 18 which deals with deductions at the source on "salaries" and "interest on securities" provides by its fifth clause that credit is to be given to the person from whose income the deduction was made for that deduction in the assessment, if any, made for the following year. Section 22 which imposes the duty of making a return prescribes that it is to be a return of the total income during the previous year. There is nothing in this section which suggests that it is any part of the duty of an income-tax officer to make enquiry into the receipts or probable receipts of the assessee during the current year. Section 25 deals with the case where any business, profession or vocation is discontinued. It differentiates strongly between such

businesses according as they were commenced before or after the commencement of the Act. As regards the latter, the first clause empowers the Income-tax Officer to accelerate the ordinary course of things and to make an assessment on the profits of the period between the end of the previous year and the date of discontinuance without waiting until the following year. In such a case the assessee may at once be charged not only with the tax in respect of the profits of the previous year but also with the tax in respect of the profits of the broken period. When, however, a business was in existence and paying tax prior to the Act of 1922, we find it provided that the assessee need pay no tax on the profits of the broken period and may further claim, if it suits him, to escape tax upon the profits of the previous year by paying tax upon the profits of the broken period only. The reason why a different treatment is given to businesses commenced before 1922 which are discontinued after that year is because such businesses will really have paid income-tax twice on the profits of the year 1921-1922 or, to put the matter in other words, they would have, apart from special provision, to pay tax on the profits of one year more than under the previous system. This section like section 3 uses the words "in respect of" which are also the crucial words in sections 7 to 12 inclusive. In my opinion, section 25 is incapable of being interpreted otherwise than as a provision to prevent injustice being caused by the tax being made for the first time a simply retrospective tax. The absence of all provisions for adjustment (See section 68) and a complete avoidance of any phrase which would suggest that the purpose of the Act is to measure or compute finally or provisionally the amount of the income received during the year of assessment produces a striking contrast between the Indian Act of 1922 and the English Acts.

It is quite true that the sections which describe the heads of income reproduce the language of the Act of 1918 without changing from the present to the past tense. The language of sections 6, 7, 10 and 11 of the Act of 1918 affords little room for any such change. But just as in the Act of 1922 agricultural income continues to be defined as rent or revenue derived from land which is used for agricultural purposes, so the property to be taxed is still described as property "of which he is the owner" (section 9) and allowance under the head 'Business' is made for rent paid for the premises in which such business is carried on (section 10). So too by section 14 the tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family. It seems to me to be reasonably clear in sections 9 and 10 that though the present tense is used throughout the sections are to be applied to the state of facts in the "previous year" or in the case of an exceptional assessment under section 25 (1) a completed portion of the year of assessment. They afford no reasonable ground for a contention that the particular sources numbered (iii) and (iv) must persist throughout two years in order to be chargeable. It is here that it is important to remember that the income-tax is one tax as section 3 shows it to be.

There are doubtless some difficulties in this view with reference to the tax on "Salaries" and "Interest on Securities" which is payable by deduction at the source. If the Finance Act of any year imposes a tax upon the income of the previous year, then in these cases the tax seems to be deducted before it is authorised or imposed. Section 18 says it is to be "leviable in advance by deduction at the time of payment." The draftsman does not seem to be in sight of the difficulty. Leviable in advance of what? In advance of its imposition? The tax is to be deducted apparently at the rate laid down by the current Finance Act. In respect of the income of this year the Finance Act of next year may impose quite different rates or (theoretically) no income-tax at all. Section 18 uses the words "in respect of income" chargeable under the following heads (1) salaries and (ii) interest on securities. When any given Finance Act is passed it is too late to levy in advance income-tax "in respect of such income of the previous year." What seems logically necessary is an addition to section 3 to make it read in effect: "Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee—

(1) tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act, in respect of all income profits and gains of the previous year of every individual, company, firm, and Hindu undivided family ;

(2) tax at that rate shall be deducted in accordance with and subject to the provisions of this Act from all salaries payable in that year on account of the income-tax, if any, to become chargeable in respect thereof for the following year ; and

(3) tax at the maximum rate shall be deducted in accordance with and subject to the provisions of this Act from all interest upon securities payable in that year on account of the income-tax, if any, to become chargeable in respect thereof for the following year."

Still however one may criticise the language of section 18 this is the only meaning which in my judgment can be given to it having regard to the language and the scheme of the Act.

In my judgment the first question put to us for our opinion must be answered in favour of the Inland Revenue and against the assessee.

As the facts of present case have not been fully investigated it may be well to add that this judgment is not to be taken as an opinion that the assessee has no grievance. If he was the owner of the house property and *bustee* lands before 1922 and paid tax thereon under the Act of 1918, then in 1922-1923 he paid tax for the second time on the income of 1921-1922 and if he has to pay for the year 1924-1925 it may therefore be that he is paying for one year more than he would have done under the 1918 Act. This will be so if in 1924-1925 he received no income from these sources. If he has lost his property by a mortgage sale in 1924, then although neither section 25 nor any other section of the Act of 1922 protects him, the case may be a very hard one and he may have special claim to some consideration at the hands of the Inland Revenue authorities.

The second question is stated as follows :—

"Is an amount of interest due on a mortgage debt but not actually paid, an allowable item of expenditure under head 'House property income' under section 9 of the Act?"

In my opinion this question should be answered in the affirmative *i.e.*, in favour of the assessee. Apart from the consideration that a taxing statute should be construed, if possible, by confining oneself to the ordinary meaning of the words used and that there is special objection to any construction which puts a burden upon the subject when the intention of the Legislature to impose it is not clear, I think that sections 9 and 10 of the Act of 1922 must be construed on the footing that when the Legislature means "paid" it says "paid." In section 10 there is a special definition of the word for the purposes of that section. In section 9 certain "allowances" are authorised by way of deduction from "the *bona fide* annual value" of the property, itself a hypothetical figure. The first two allowances have reference to repairs and do not depend upon proof of any actual expenditure. The third and the fifth are expressly made to depend upon what has actually been paid. The sixth is defined only by a limit and the seventh is left to the discretion, as regards amount, of the Income-tax Officer. In this context I am of opinion that the absence of the word 'paid' in the fourth clause is not without significance. I am not satisfied that the Legislature has intended to charge on the basis of the sum which a hypothetical tenant would give save upon the assumption made in favour of the assessee that the real income of an incumbrancer is the difference between the yearly value and the interest. Though I desire in no way to pronounce upon the policy, convenience or equity of the matter I cannot ignore the fact that there may be many reasons for making this assumption. If this be the right construction of the statute I do not think that any exercise of the rule-making power conferred by section 59 can affect the question ; still less do I think that the headings to Schedule A of the Form prescribed by Rule 19 are to be taken as rules.

In my opinion the assessee is entitled to the allowance in respect of interest on the mortgage.

As we were asked by Counsel for the Inland Revenue to treat this as a test case and as the assessee has succeeded on one of the two questions, I think that the assessee's costs before us should be paid by the Inland Revenue.

GHOSE J. :—I agree.

BUCKLAND J.—As I am in entire accord with the learned Chief Justice as to the effect of the more general aspects of the matter which he has discussed and of the sections of the Income-tax Acts to which he has referred, I propose to limit myself to an examination of the sections which bear directly upon the question which we have to decide.

The essential point of difference between the contentions advanced on behalf of the assessee and the Crown respectively lies in the questions whether the amount of tax payable in the current year has to be computed by reference to the assessee's income for the previous year though payable in respect of the assessee's income for the current year, or whether it is payable in respect of the assessee's income for the previous year though payable in the current year. In the former case the previous year's income is but a basis of computation which gives rise to the contention that if in the current year the assessee has no income no tax is payable. The view put forward on behalf of the Crown makes it immaterial whether the assessee has any income in the current year. If the Crown's view prevails the assessee, though he must pay the tax in the current year for which he is assessed, pays in respect of his income for the previous year and the state of his income for the current year is negligible.

But for such resemblances as are to be found between the Indian Income-tax Acts of 1918 and 1922 and between the former of these and the Income-tax Act, 1918 (8 & 9 George V, cap. 39) and were the assessee's Advocate limited to the Act of 1922, most of the material upon which his argument has been founded would not be available to him.

There is no difference between the definition of "previous year" in the two Indian Statutes. The difference between the two Acts lies in the references in the material sections of the Acts to the period so defined or, to state it otherwise, in the purpose for which the words "previous years" are introduced into such sections.

By section 14 of the Act of 1918 it is provided that "there shall be levied in respect of the year beginning with the 1st day of April, 1918 income-tax upon every assessee in respect of his taxable income in that year," that is to say, income-tax must be paid "in respect of" income for the current year.

Section 17 of the same Act requires a return of the assessee's income for the previous year, and under section 18 the sum payable for the year in which the return is made may be assessed upon the basis of such return. Nothing could be clearer than that the previous year's income is introduced solely as a means of ascertaining by reference to it the amount of tax payable in the current year in respect of the income of the current year. It would be a careless form of expression to say that the income for the current year is estimated by reference to the income of the previous year, but the notion of an estimate is not altogether absent, for the result is that the amount of tax payable in respect of an unascertained income is arrived at by reference to an income the amount of which is ascertainable.

Section 3 of the Act of 1922 provides :—"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year tax shall be charged for that year in respect of all income, profits and gains of the previous year"; this takes no account of the income of the previous year as a basis of assessment only, for not only cannot that be imported into the use of the words "in respect of" as suggested in the course of argument, but the words "in respect of" as denoting that which is to be taxed have been used frequently both in English and Indian Statutes. The words involve nothing in the least degree obscure, and they cannot have one effect in section

14 of the Act of 1918 and another in section 3 of the Act of 1922. It is to be observed that the section provides that income-tax shall be charged, not in respect of the income of that year, *i.e.* the current year, as one would have expected to find had the Legislature intended to express that which the assessee contends it has expressed, but "for" that year. It is unnecessary to say that "in" must be read for "for"; either word would produce the same result.

It is impossible upon an analysis of section 3 to hold that the previous year's income is but the basis of assessment while the tax has to be paid in respect of the income for the current year. Fundamentally the determination of the question rests exclusively upon the construction of this section, for there is no other which deals with it directly.

Comparing the result attained with that under the Act of 1918 to which I have referred, one finds that under the Act of 1922 the income by reference to which the amount of tax payable in the current year has to be ascertained and in respect of which such tax when ascertained is payable are one and the same, and being income for the previous year is an income the amount of which is ascertainable. Any notion of an estimate is absent, indeed there is no room for it.

I agree as to the answers to be given to the questions submitted to us for decision.

[181] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Sir Cecil Walsh, Kt., Chief Justice and Mr. Justice Banerji.

[18th February, 1927.]

Messrs. Nihal Chand Kishori Lal of Cawnpore .. Assessee.*

v.

The Commissioner of Income-tax, United Provinces .. Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (14), 26 & 44—Joint Hindu family business—Conversion into partnership—Registration of partnership—Liability of registered firm, basis of—Assessment at rates applicable to joint Hindu family—Discontinuance, meaning of.

The assessee was assessed to income-tax and super-tax as a joint Hindu family for the year 1925-1926 in respect of their income of the previous year June, 1924, to June 1925. On the 10th April, 1926 they purported to effect a partition by a deed under which they ceased to carry on business as a joint Hindu family and constituted themselves as a partnership with specified shares and this deed was registered within the due date with the Income-tax Officer. On the claim of the assessee to be assessed as partners of a registered firm.

Held, that the assessee, the registered firm, as the successors to the joint Hindu family which ceased to carry on business on the registration of the partnership, were liable to be assessed under Sec. 44 of the Act on the income of the business carried on by the joint Hindu family at the rates applicable thereto during the accounting period, such liability being determined by the fact as to who was in fact carrying on the business and making the income during the accounting period.

The expression 'discontinuance' in Sec. 44 of the Act may mean total abandonment or extinction, or self-extinction for the purpose of reconstruction under another form.

Begg Sutherland & Co. v. Commr. of Income-tax, 2 I. T. C. 30. followed.

Case [Miscellaneous Case No. 62 of 1927] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, as per his letter, dated 17th January, 1927, for the opinion of the High Court.

CASE.

Messrs. Nihal Chand Kishori Lal of Cawnpore were assessed to income-tax and super-tax as a Hindu undivided family by the Income-tax Officer, Cawnpore, on August 9, 1926, with reference to their income, profits and gains in the year Asarh Sambat, 1981—Asarh Sambat, 1982, corresponding to June, 1924—June, 1925 A.D.

2. The assessee, however, claimed to be assessed as a registered firm and not as a Hindu undivided family. They claimed that a partition had taken place in the year 1925 in the circumstances narrated in the sworn statements made by Lala Kishori Lal and his sons, Lala Rameshwar Lal and Lala Ram Bilas, to the Income-tax Officer,

* (1927) A. L. J. 366 ; A. I. R. (1927) All. 397.

Cawnpore, on May 17, 1926, of which an extract copy is enclosed. After the partition they constituted themselves a firm, and when the books of the accounting period in question were made up in Kartik Sambat, 1982 (corresponding to October, 1925), the profits were shown as divided between the partners according to their shares. A deed of partnership was drawn up and registered on April 10, 1926. This deed was also registered with the Income-tax Officer, Cawnpore, under section 2 (14) of the Indian Income-tax Act, 1922, on June 12, 1926, within due date, and the firm thus became a registered firm for the purposes of the Income-tax Act.

3. The Income-tax Officer rejected the claim of the assessee to be assessed as a registered firm on the ground that during the accounting period the family had been joint.

4. The assessee appealed to the Assistant Commissioner in a petition of which the relevant part is enclosed (Appendix B). The Assistant Commissioner upheld the decision of the Income-tax Officer, remarking that "from the statement of Lala Kishori Lal it is established that the separation took place from Asarh Sambat, 1982, and the profits under consideration are for the year ending Asarh Sambat, 1982. The case becomes exactly similar to the case of *Begg Sutherland & Co. v. The Commissioner of Income-tax, United Provinces*,⁽¹⁾ and in accordance with the ruling given by the High Court, I hold that the profits must be assessed as those of a joint Hindu family, the succeeding firm being liable for the amount assessed."

5. The assessee has now claimed a reference to the High Court on certain points of law as set forth in the extract copy of a petition attached: the whole petition is not enclosed, as other points are being dealt with by the Commissioner under section 33 of the Income-tax Act.

6. It will be observed that in paragraph 2 of the petition it is stated that the petitioners were legally separate in Magh Sambat, 1981 (corresponding to January, 1925). This point was not raised in the petition of appeal, but the Assistant Commissioner has definitely stated that the separation took place from Asarh Sambat, 1982 (June, 1925). Indeed, he could not have come to any other finding from the sworn statements on the record.

7. The points of law stated by the assessee are :—

(i) Whether in face of the fact that the petitioners had applied for registration to the Income-tax Officer before the date on which the return was due, accompanied with the instrument of partnership, specifying the individual shares of the partners and giving all the other particulars as required by law, and that the Income-tax Officer had registered the same, the petitioners should have been treated and assessed as partners of a registered firm or as members of the undivided joint Hindu family.

(ii) Whether the petitioners were legally separate on Asarh Sudi 2, Sambat 1982 and not before that; and, if so, how does it affect the present case?

(iii) * * *

(iv) Whether, under the circumstances of the case, the petitioners are, or, are not liable for super-tax.

(v) Whether the petitioners are the successors of the old firm as laid down in section 26 of the Act.

8. The second point does not, in the opinion of the Commissioner, arise out of the appellate order, and the Commissioner is unable to state it. In any case he is of opinion that the date of the partition is a question of fact. If, however, the High Court holds that a point of law does arise, the Commissioner would express the opinion that the partition took place from Asarh, 1982 (corresponding to June, 1925); this is proved by the categorical statement of Lala Kishori Lal "The separation took place from Asarh, 1982", by the first two paragraphs of the statement of Lala Rameshwar, and also by the evidence of Lala Ram Bilas. It is in no sense proved

that a partition took place in Magh Sambat, 1981 (corresponding to January, 1925). There appears to have been a threat to do so in certain contingencies, but nothing more.

The fourth point is in reality not relevant as a point of law. If the answer to the first point is in the assessee's favour, it necessarily follows that there will be no liability to super-tax.

The fifth point is not intelligible, as there was no "old firm"; in any case the point which seems to be intended is covered by the first point.

9. The first point urged by the petitioners can preferably be stated as follows and the Commissioner so states it :—

In the circumstances of the case, how are the income, profits and gains of the accounting period to be assessed? Are they to be assessed as the income, profits and gains of a Hindu undivided family, the liability for the payment of any tax assessed falling on the firm as successors to the family? Or are they to be assessed as the income, profits and gains of a registered firm?

10. In the opinion of the Commissioner the assessment should be made according to the first alternative method stated, in accordance with the decision of the High Court in *Begg Sutherland & Co. v. Commr. of Income-tax*.⁽¹⁾

Kailas Nath Katju, for the assesseees.

G. W. Dillon, for the Crown.

JUDGMENT.

This is a case stated by the Commissioner of Income-tax. Shortly stated the matter arises in this way. A certain firm Nehal Chand Kishori Lal of Cawnpore carried on business as a joint Hindu family, and were doing so between June 1924 and June 1925, the relevant period on which their profits had to be based for the assessment under discussion, their practice being to keep their accounts from June to June. They purport to have effected partition on the 10th April, 1926 by means of a deed in respect of which they ceased to carry on business as a joint Hindu family and constituted themselves a partnership with specified shares. Whatever legal effect that partition might have in other respects, it had no effect under the Income-tax Act until the 12th June, 1926, when the deed was registered. From that date they must be treated as a registered firm under the Act. The result of that transaction was that they ceased to carry on business as an undivided Hindu family and began to carry on the same business as a registered firm. These two terms are dealt with in two separate definitions in sub-section (9) and sub-section (14) respectively of section 2 of the Income-tax Act. Although Dr. Katju, their counsel protested against the view, we have no doubt that as a matter of law and for the purpose of this Act, the registered firm on the 12th June, 1926 became the successor of the Hindu undivided family in the carrying on of the business. The business may have been the same. It was undoubtedly carried on by a totally different legal person. From that moment the assessee was the registered firm. It could not be the Hindu undivided family, because the undivided family ceased to exist as a person carrying on the business, so that the registered firm had the duty of making the return and had the obligation of making the payment due as assessee. This, however, does not dispose of the question. As was said in *Begg Sutherland & Co. v. Commr. of Income-tax*.⁽¹⁾ "The conversion of a firm into a company, (the principle applies equally to the conversion of a joint Hindu family into a registered firm,) does not in any way affect the profits made by the firm before the conversion or the legal liability to income-tax which already existed before the conversion. The liability to assessment is not conclusive as to the chargeability in respect to the period for which such assessment is made." Possibly that language is not as clear and comprehensive as it might be, but the Court there was dealing with a negative case, that is to say, it was rejecting the suggestion that the new assessee, who would have been liable to super-tax if he had carried on the business during the

(1) 2 I. T. C. 30.

period under consideration, was liable to pay super-tax for such period although his predecessor in business would not have been liable if he had continued the business as before and had been the assessee.

We think that this is made even clearer by the machinery provided by the Act upon which the Court in that case did not dwell. Having discovered your assessee, it is then necessary to see what it is he is liable for by the Act. By section 10 the tax shall be payable by the assessee under the head of 'business' in respect of the profits or gains of any business carried on by him. What profits and gains those are, are prescribed by section 3, which provides that the tax should be charged at the rate or rates applicable to the total income, profits and gains of the previous year, on every individual, company, firm and Hindu undivided family. You therefore have to look at the profits of the business in the previous year by whomsoever it was carried on, and if the rate chargeable depend upon the constitution of the firm or company which carried it on, you must look to see what was the firm or individual which carried it on. If such individual or firm is not by law chargeable for super-tax, then the rate to be charged on the profits of that previous year must not include super-tax. If on the other hand, the individual or firm carrying on the business in that previous year is chargeable with super-tax, the rate charged upon the assessee must include that super-tax, for, as in the case of *Begg Sutherland and Co. v. Commr. of Income-tax* (1) which is really the converse of this case, the assessee is not necessarily the person who was carrying on the business and making the profits of the previous year upon which the assessment made upon him has to be based. In our view, section 44 makes this abundantly clear. It deals with liability in the case of a business which has been carried on by a firm and been discontinued. Discontinuance may consist of various forms. It may mean total abandonment or extinction, it may mean self-extinction for the purpose of reconstruction under another form. In this case, the business as carried on by the undivided Hindu family was discontinued in the eyes of the law and in accordance with the provisions of this Act, on the 12th June, 1926 when the deed was registered, it was recommenced by the registered firm from that date, and section 44 preserves the existing liability at the time of such discontinuance and makes every member of the firm which has been discontinued, jointly and severally liable for the amount of the tax payable in respect of the income, profits and gains of the firm up to the date of such discontinuance, that is to say, the profits and the rate chargeable thereupon as provided by section 3. It appears to us that section 44 could not have been designed for any other purpose, and applies without any straining of the language. Section 26 is equally clear, but in our view it applies to a different consideration, namely, the ascertainment of the assessee within the meaning of section 2 at the time when the assessment is made, and it does not affect the rate or the period in respect of which the profits have to be computed. When any change occurs in the constitution of a firm or when any person has succeeded to any business,—and we find that the registered firm succeeded to the business of this undivided family,—the assessment shall be made on the firm as constituted at the time of making the assessment, that is to say, in this case, on the registered firm.

The machinery of the Act seems to be consistent and carefully designed for dealing with every possible contingency which may arise in business. We agree with the principle laid down in *Begg Sutherland & Co. v. Commr. of Income-tax* (1) and are of opinion that the decision in this case follows from it as a necessary corollary. Our answer to the question stated in paragraph 9 of the Commissioner's case is that the rate to be assessed upon the income, profits and gains of the accounting period is to be determined by the fact as to who was in fact carrying on the business and making such income, profits and gains during the accounting period. In other words, they must be assessed on such income, profits and gains of a Hindu undivided family, the liability for payment thereof falling on the assessee, the registered firm which is the successor to the joint family which has ceased to carry on the business. The assessee must pay the costs of this reference. We might mention that the question of the company in

(1) 2 I. T. C. 30.

Begg Sutherland & Co's⁽¹⁾ case having become the successor of the firm as assessee within the meaning of section 26 of the Income-tax Act, was not disputed by the late Mr. L. M. Banerji, who argued on the behalf of the company. We assess the fee of the Government Advocate as Rs. 100.

[182] IN THE HIGH COURT OF JUDICATURE AT LAHORE

Before Mr. Justice Jai Lal and Mr. Justice Zafar Ali.

[15th January, 1927.]

R. S. Lala Jessa Ram of Dera Ismail Khan

.. Assessee.

v.

The Commissioner of Income-tax, Punjab and N. W. F.

Provinces

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 33, 34 & 35—Commissioner's powers of review—Enhancement of assessment after expiry of a year from assessment year—Assessee moving Commissioner under Sec. 33 within the year—Limits of Commissioner's powers.

The powers of the Commissioner of Income-tax under Sec. 33 of the Income-tax Act are subject to the same restrictions as those of the Income-tax Officer under Secs. 34 or 35 of the Act.

Where action could have been taken by the Income tax Officer under Sec. 34 or 35 of the Act, the fact that the assessee in his application for a case under Sec. 66 (2) of the Act moved the Commissioner to take action under Sec. 33 would not make any difference in the limitations on the Commissioner's powers to re-open and alter an assessment to the prejudice of the assessee.

Case [Referred Case No. 20 of 1926] stated under section 66 (1) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Punjab and North-West Frontier Province, Lahore, with his letter No. 505 J/M. 893, 26, dated 18th May 1926, for the opinion of the High Court.

CASE.

The facts of this case are as follows :—

On the 27th June, 1924 the assessee presented to me an application headed "application under section 61, Income-tax Act for reference to High Court a question of law". The figure 61 in this heading is an obvious mistake for section 66 (2). The application ended with the following paragraph :—

"The learned Commissioner may if he pleases take action under section 33 of the Act". The chief point at issue in the case was that the assessee claimed to have written off in the accounting period a sum of Rs. 3,111 said to be irrecoverable loans standing in the names of certain Pawandas some of whom were said to be dead and some to be not traceable. As a result of enquiries made into the case it was decided to allow the assessee to write off two of the items in question amounting to Rs. 1905, and the result of this was to reduce the net taxable income from Rs. 23,434 to Rs. 21,529, the tax being calculable at 15 pies owing to the assessee having shares in other businesses which brought their total income over Rs. 30,000. When the tax on the reduced income was calculated it was discovered that this actually amounted to a larger sum than had been previously demanded from the assessee, and the mistake was found to have originated in an assessment order dated the 31st December, 1923 wherein the Income-tax Officer found the taxable income to amount to Rs. 19,434, and concluded the order with the words "I assess this at-1/3 in the rupee, to Rs. 1,214/10 for which a notice of demand and chalan should issue." It will be seen that the Income-tax Officer while noting that he was assessing at-1/3 in the rupee has actually calculated the tax at one anna only. There was a subsequent order dated the 20th May, 1924 under section 34 of the Act assessing a further sum of Rs. 4,000 reported from Calcutta to income tax amounting to Rs. 382/8 at-1/3 per rupee, the tax in this case being correctly calculated. I therefore passed an order reducing the taxable income from Rs. 23,434 to Rs. 21,529. It was then discovered that the result of calculating the tax at the correct rate was an enhanced instead of a reduced demand and I therefore passed my order dated the 21st August, 1925 calling upon the assessee to state whether they desired an opportunity of being heard prior to the order fixing the taxable income at a reduced sum, but the tax at an enhanced sum being made absolute. A hearing was given on the 15th December, 1925, and I passed an

(1) 2 I. T. C. 30.

order on that date under section 33 fixing the taxable income at the reduced rate but the tax due at the enhanced rate. This order not being one under section 31 or section 32 the assessee has no opportunity of submitting an application under section 66 (2) in respect of any legal points that may arise therefrom and I therefore consider it equitable for me to make a reference myself under section 66 (1) of the Act to the High Court on any legal point arising out of my order of the 15th December, 1925. It appears to me that the legal point arising out of that order is as follows :—

“ If in review proceedings taken under section 33 of the Act originating in a petition from the assessee under sections 66 and 33 of the Act the Commissioner reduces the net taxable income, and it is then found that the tax correctly calculated on such reduced taxable income is more than the tax originally demanded, owing to the said tax originally demanded having been by a clerical error calculated at too low a rate, is the Commissioner prevented by any provision of law from calculating the tax correctly on the reduced taxable income, with the result that the order under section 33 operates to create an enhanced demand rather than a reduced demand, provided that the provisions of the proviso to section 33 have been duly complied with before the final review order is passed ? ” Counsel for the assessee was prepared to admit this point but claimed that the real point at issue was one of limitation arguing that my order of the 21st August, 1925 calling upon the assessee to show cause against the passing of the order under section 33 in this case was barred by limitation as it was more than one year after the date of the original order dated the 31st December, 1923 in which the mistake in calculation occurred as such mistake could not now be corrected by the Income-tax Officer under section 34 or section 35. I cannot myself see that any legal question of limitation arises, firstly because there is no legal limitation to the exercise of review powers by the Commissioner under section 33 of the Act, and secondly because even if such limitation did exist my order of the 15th December, 1925 is the final order in the regular review proceedings which originated in the assessee's petition of the 27th June, 1924 at which date it is admitted that action could have been initiated by the Income-tax Officer under section 34 or section 35. At the request of the assessee therefore I refer to the Court of the Judicial Commissioner, North West Frontier Province under section 66 (1) of the Income-tax Act the following question of law :—

“ Whether, under the circumstances of the present case, there is any legal limitation preventing the Commissioner from passing his order under section 33 dated the 15th December, 1925, the result of which is an enhanced demand.”

For the reasons that I have given above it appears to me obvious that the answer to the question is that there is no such limitation, firstly because the Income-tax Act provides no period of limitation within which the powers of the Commissioner under section 33 are to be exercised, and secondly, because even presuming that a limitation of one year did exist, the review proceedings resulting in the order in question originated in the application submitted by the assessee on the 27th June, 1924, less than six months after the date of the particular order in which the mistake in calculation originally occurred.

Assessee not represented.

Jagan Nath Aggarwal, for the Crown.

JUDGMENT.

This is a reference under section 66 (1) of the Indian Income-tax Act by the Commissioner of Income-tax Punjab and N.-W. F. P. and the question on which we are asked to give our opinion is “ Whether under the circumstances of the present case there is any legal limitation preventing the Commissioner from passing his order under section 33 dated the 15th December, 1925 the result of which is an enhanced demand.” The circumstances referred to are that the assessee was assessed to income-tax on an income of Rs. 23,434 but in actually calculating the tax the Income-tax Officer made calculations at the rate of $\frac{1}{1}$ in the rupee instead of $\frac{1}{3}$ which was the proper rate of tax on the amount concerned. In his order, however, the Income-tax

Officer clearly stated that the amount of tax had to be and was calculated at the latter rate. It will thus be observed that there was a mistake of calculation apparent from the record of the assessment. The assessee, however, was not satisfied with the amount on which he had been assessed and claimed a reduction on Rs. 3,111 said to be irrecoverable loans written off during the accounting period. He applied to the Commissioner to refer the matter to this Court, or to exercise his powers of review under section 33 of the Income-tax Act. The learned Commissioner entertained the application for review and finally decided to allow the assessee Rs. 1,905 as irrecoverable loans written off during the accounting period. The result was that the total assessable income was reduced to Rs. 21,529 but the Commissioner calculated income-tax thereon at $\frac{1}{3}$ per rupee. The result was that the actual amount of income-tax demanded from the assessee exceeded the amount for which a notice of demand had originally been issued by the Income-tax Officer on the 21st of December, 1923. The final order of the Commissioner was passed, on the 15th of December, 1925, the date of the assessee's application to him being the 27th of June, 1924. It will thus be observed that the application for reference and review was presented within one year of the date of demand but actual rectification of the mistake was made by the Commissioner more than a year after that date. The learned Commissioner is of opinion that no question of limitation arises when he passes an order under section 33 of the Indian Income-tax Act in exercise of his powers of review and that in the present case, as the review proceedings originated in the assessee's petition of the 27th of June, 1924 on which date action could have been initiated by the Income-tax Officer under sections 34 or 35 of the Act, the ordinary period of one year provided by these sections did not apply.

After giving our careful consideration to the above opinion and the arguments advanced before us by Mr. Jagan Nath Aggarwal who appeared for the Crown, we are of opinion that the question should be answered in the affirmation. Section 33 provides that the Commissioner may call for the record of any proceedings under the Act and after such enquiry as he may consider fit may pass such orders as he thinks fit, but subject to the provisions of the Act. Now section 35 provides that the Income-tax Officer may at any time within one year from the date of any demand rectify any mistake apparent from the record of the assessment. This power includes the rectification of a mistake which has the effect of enhancing assessment. The words "Subject to the provisions of this Act" contained in section 33 leave no doubt in our minds that the Commissioner is not entitled to pass an order which he himself or another Income-tax authority is not authorised to pass under the other provisions of the Act. In the absence of an express provision enabling the Commissioner to pass orders prejudicial to an assessee without any limit of time we are of opinion that his powers are subject to the same restrictions as those of an Income-tax Officer under section 35 which clearly provides that an Income-tax Officer is not entitled to rectify a mistake to the prejudice of an assessee after the expiry of one year from the date of the demand. Even if the case be governed by section 34 which enables an Income-tax Officer to reassess income, profits or gains when they have escaped assessment or have been assessed at too low a rate, the same remarks would apply *mutatis mutandis*, as under that section also the powers must be exercised within one year. We are, therefore, of opinion that the expression "subject to the provisions of this Act" includes the restrictions as to limitation imposed on other Income-tax authorities and consequently the rectification of the mistake in this case to the prejudice of the assessee after the expiry of one year from the date of the demand made upon the assessee was not authorised by law. To hold otherwise would mean that there is no limit to the Commissioner's power to re-open and alter assessments to the prejudice of an assessee, a position that the Legislature could not have contemplated. The fact that the assessee had moved the Commissioner under section 33 would not, in our opinion, make any difference because the question of rectification was not covered by his petition.

With the above expression of our opinion we return the case to the Commissioner. The assessee was not represented before us; there will, therefore, be no order as to the costs of this reference.

[183] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Broadway and Mr. Justice Zafar Ali.

[8th October, 1926.]

N. D. Radhakrishnan and Sons

Assesseees*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Province.

Income-tax Act (XI of 1922), Secs. 22 (4) & 23 (4)—Business carried on in British India and Kashmir—Notice to produce Kashmir accounts—Assessment under Sec. 23 (4) on non-production—Powers of the Income-tax Officer to call for accounts—Duty of the Assistant Commissioner.

The assesseees carrying on business in Rawalpindi and Kashmir were called upon under Sec. 22 (4) of the Income-tax Act to produce the Kashmir accounts as profits were said to have been received therefrom. On failure to produce the said accounts, the Income-tax Officer avowedly acting under Sec. 23 (4) made a provisional assessment subject to reconsideration on production of accounts. An appeal to the Asst. Commissioner was rejected on the ground that the order appealed against was passed under Sec. 23 (4). On the refusal of the Commissioner to state a case, an application was made to the Court under Sec. 66 (3).

Held, that under Sec. 22 (4) the Income-tax Officer had power to call for the Kashmir accounts and that as the Asst. Commissioner was satisfied that the Income-tax Officer had as a matter of fact applied his mind in exercising his powers under Sec. 23 (4), the Commissioner's order declining a reference was right.

The mere fact that the Income-tax Officer professed to act under Sec. 23 (4) would not be enough to prevent the Asst. Commissioner from satisfying himself that the Income-tax Officer acted within his powers under that section.

Application [Miscellaneous Civil Case No. 242 of 1926] made under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax to state a case.

Deo Raj Sawhney, for the assesseees.

Jagan Nath Agarwal, for the Crown.

JUDGMENT.

This is an application under section 66 (3) of the Income-tax Act asking for a mandamus to issue to the Commissioner of Income-tax directing him to refer certain questions to this Court for opinion.

It appears that the applicant carried on business in Rawalpindi and Kashmir. The Income-tax Officer, Rawalpindi, acting under section 22 (2) of the Income-tax Act called upon the applicant to furnish a return of his income. A notice under section 22 (4) was also issued to the applicant requiring him to produce, or cause to be produced, his accounts. The applicant furnished the return of his income and produced the account books relating to his business at Rawalpindi but did not produce the account books relating to the business at Srinagar in Kashmir. The Income-tax Officer thereupon specifically called upon him to produce those account books, but the applicant through his agent refused to do so. The Income-tax Officer then passed an order assessing the applicant at a certain figure. This assessment was, however, stated in the order to be provisional one, subject to reconsideration should the applicant comply with the notice and show that the provisional assessment was wrong. As the applicant took no steps to do so the provisional assessment was confirmed and made a regular assessment. The Income-tax Officer avowedly assessed the income of the applicant acting under section 23 (4).

Against this assessment the applicant preferred an appeal to the Assistant Commissioner of Income-tax who, on the 30th May 1925, dismissed the appeal holding that "it was clear from the file that the Income-tax Officer has passed his order under section 23 (4) and that he had applied his mind at that time to the fact that he was doing so." At the conclusion of his order the Assistant Commissioner pointed out that the correct remedy was for the applicant to take action under section 27 of the

* (1927) 101 Ind. Cas. 321 ; A. I. R. (1927) Lah. 5.

Income-tax Act. It appears that an application under section 27 had been made and that in that application the applicant stated that he was prepared to produce the account books in question, namely, those relating to the business at Srinagar in Kashmir. This application apparently was dismissed and it was not pressed again.

The applicant then moved the Commissioner of Income-tax asking him to (a) review the orders passed by his subordinates, and (b) refer the question to this Court under section 66 (2). The Commissioner held that the orders passed by his subordinates were legal and reasonable. He declined to refer the question to this Court.

The questions which were asked to be referred are: (1) whether under section 22 (4) the Income-tax Officer had power to call upon the applicant to produce his account books relating to the business in Srinagar in Kashmir; and (2) whether the Assistant Commissioner ought to have examined the proceedings in order to satisfy himself that the action of the Income-tax Officer was correct and that his order had been properly passed under section 23 (4).

With regard to the first question section 22 (4) runs as follows:—The Income-tax Officer may serve on the principal officer of any company or on any person upon whom a notice has been served under sub-section (2) a notice requiring him, on a date to be therein specified, to produce, or cause to be produced, such accounts or documents as the Income-tax Officer may require. There is a proviso to this sub-clause with which we are not at present concerned.

In my judgment this sub-clause (4) is a very wide one and gives the Income-tax Officer very wide powers. We are not concerned with the advisability or otherwise of giving the Income-tax Officer such wide powers. We have only to interpret the section and in my judgment the interpretation involves a finding that in the present case the Income-tax Officer had the power to call upon the applicant to produce all his account books, including the account books relating to the Srinagar business; for admittedly profits were received from the Srinagar business at Rawalpindi. This being so, in my judgment the Commissioner of Income-tax rightly refused to refer this question to this Court.

With regard to the second question I think that having regard to my opinion relating to the first question the Income-tax Commissioner was obviously right in not moving this Court. I think that ordinarily it would be the duty of the Assistant Commissioner to satisfy himself that the proceedings of the Income-tax Officer were in order and the mere fact that he professes to act under section 23 (4) would not be enough to prevent the Assistant Commissioner from satisfying himself that the Income-tax Officer's claim was correct. In the present case, however, it appears that the Assistant Commissioner was satisfied that the Income-tax Officer had, as a matter of fact, acted within his powers in this connection. I would, therefore, dismiss this application with costs.

[184] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Zafar Ali and Mr. Justice Jai Lal.

[11th January, 1927.]

Tora Gul Boi

.. Assessee*

v.

The Commissioner of Income-tax, Punjab and N. W. F.
Province

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 4 (1)—Assessee entrusted with goods as commission agent for sale in Europe—Sale proceeds in Europe transferred to British India—Disputes about ownership of sale proceeds—Compromise at Kabul allotting commission to assessee—Commission, if received in British India and assessable under Sec. 4 (1).

The assessee, a resident of Peshawar, entrusted as commission agent by the Amir of Bokhara with the sale of goods in Europe deposited the sale proceeds in a Bank in England and later had the

* (1927) I. L. R. 8 Lah. 335; 102 Ind. Cas. 298; A. I. R. (1927) Lah. 512.

amount transferred to the Bank's Branch in Bombay. Disputes having arisen subsequently as to the ownership of the deposit amount, a compromise was entered into at Kabul under which the assessee was allotted out of the deposit a sum of 2 lacs as his commission. On an assessment of this commission,

Held, that the sum assessed was received by the assessee in British India under the allotment by virtue of the compromise, the receipt of the amount in England not being as owner but as agent and hence was assessable under Sec. 4 (1) of the Income-tax Act.

Case [Referred Case No. 195 1926] referred by the Commissioner of Income-tax, Punjab and North-West Frontier Province, under section 66 (1) of the Income-tax Act (XI of 1922) for the opinion of the High Court.

CASE.

For the Reference by the Commissioner of Income-tax in this case, see page 164 *ante*.

Moti Sagar and Mohsin Shah, for the assessee.

C. Bevan Petman, for the Crown.

JUDGMENT.

This reference under section 66 (1) of the Income-tax Act, relating to an assessment made on a person residing in Peshawar, came up once previously before two Judges of this Court,* but they returned it to the Income-tax Commissioner by order, dated the 6th January 1926, holding that they had no jurisdiction to entertain it, as the High Court for an assessee residing in Peshawar was the Court of the Judicial Commissioner, North-West Frontier Province, and not the Lahore High Court. But not long after that the Income-tax Amendment Act of 1926 came into operation, whereby the jurisdiction of the Lahore High Court for purposes of section 66 was extended to the North-West Frontier Province and the Income-tax Commissioner has, therefore, re-submitted the reference to this Court and nobody now raises the question of jurisdiction.

The facts bearing on the question of law raised by the Income-tax Commissioner are briefly as below.

The Amir of Bokhara having entrusted a large number of valuable furs to Tora Gul Boi (the assessee) and two others for sale in Europe, they conveyed the same to England and disposed of them there for a sum equivalent approximately to 16 lacs of rupees. This money they deposited with Messrs. Cox & Co. to be transferred to their Branch in Bombay, and after doing so they departed from England. On arrival in India they came to know that Bolsheviki had taken possession of Bokhara and that the Amir was a refugee in Kabul. Tora Gul Boi was a trader of Bokhara and his two companions were servants of the Amir. Hearing of the revolution in their country they decided to take up residence in Peshawar and not to return to Bokhara. When the Amir came to know of their arrival, he laid claim to the money, but they refused to pay it to him. The Amir then instituted a suit in the Court of the District Judge of Peshawar to recover the money. This suit ended in a compromise which was entered into at Kabul and was duly reduced to writing. By this compromise it was agreed that 8 lacs out of the 16 lacs deposited with Messrs. Cox & Co. would be given to the Amir, 5 lacs would be set aside for the benefit of the State of Bokhara, 2 lacs would be given to Tora Gul Boi as his commission, and Rs. 60,000 and Rs. 40,000 to his two companions respectively as their commission. The District Judge granted the Amir a decree for 8 lacs.

Now the question is whether and when did Tora Gul Boi receive the sum of 2 lacs allotted to him by the compromise. He was not liable to pay income-tax on this amount unless he received it in British India within the purview of section 4 (1) of the Income-tax Act. Mr. Moti Sagar, who appears for the assessee, argues that the money was in his possession before his return to India as he had received it in England, and that he could not have received it over again in Peshawar having once received it in England. In support of this contention he relies upon *Sundar Das v. Collector*

* See 2 I. T. C. 164.

of *Gujarat* (1), and the cases in which that ruling of this Court was followed by the Madras and Patna High Courts, i.e., *Secretary of Board of Revenue (Income-tax), Madras v. Ripon Press and Sugar Mills Co.* (2), and *Ali Imam v. Emperor* (3). He also cites *In re Aurangabad Mills, Ltd.* (4). We, however, find all those cases are distinguishable from the present inasmuch as the assessee in every one of those cases was the owner of the money that he received out of British India, while here the assessee and his companions received the money in England, not as owners thereof but as agents of the Amir. The money no more belonged to them than the furs, and they were as much trustees of the one as of the other. Though these agents of the Amir were entitled to remuneration they were not competent to convert the whole or a considerable portion of the money to their own use before settling with the Amir what was the amount payable to them. This amount was settled by the compromise, and though that compromise was entered into at Kabul the money was in British India, and the agents must have received it within British India because it was held by Messrs. Cox & Co. in Bombay at the order of all three. Further it is clear that they were not entitled to appropriate any amount, because, according to their own showing, no rate of commission had been agreed upon. They could, therefore, detain some money pending decision as to the rate, but were not competent to appropriate it to their own use. Such being the facts, we are of opinion that the assessee received the money in British India after it had been allotted to him by virtue of the compromise and was, therefore, liable to income-tax thereon.

Mr. Moti Sagar further contends that the above cannot be an answer to the question of law that has been referred to us by the Income-tax Commissioner, which question runs thus: "Did the decree of the District Judge, dated the 24th April 1923, deciding the suit in accordance with the deed of compromise executed at Kabul on the 14th April, 1923, result in the receipt by the assessee, Tora Gul Boi, of the sum of two lacs of rupees on the date either of the compromise or of the judgment?"

The learned Counsel argued that the assessee did not receive the two lacs in pursuance of the decree. This is no doubt correct, but the object obviously of the Income-tax Commissioner was to have it decided whether the assessee could be said to have received the money in British India and that is clearly impliedly, if not directly, the object of the reference.

With the above expression of opinion we return the reference.

[185] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and Mr. Justice Srinivasa Iyengar.

[4th February, 1927.]

K. V. A. L. Ramanathan Chettiar

.. Assessee

v.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 4 (2) — Foreign profits, remittance of — Entries in accounts and book adjustments — Finding of remittance based thereon — If supported by legal evidence — Correctness of finding, if can be questioned.

The assessee carrying on money-lending business in Madras, Kulalampur and other places had been drawing sums of money for a series of years from their Madras Branch for their personal expenses. In the year of account a sum of Rs. 1,63,000 and odd representing the total amount of the personal drawings was credited to the drawings account by debiting the Kulalampur Branch account in the Madras Branch with the said amount. Between the Kulalampur and the Madras Branches there were dealings which consisted in the former drawing hundies from time to time payable by the Madras Branch and in remittances made to meet those hundies and this account was a running account, the hundies and the remittances not tallying exactly.

(1) 1 I. T. C. 189. (2) 1 I. T. C. 202. (3) 1 I. T. C. 402. (4) 1 I. T. C. 116.

On an assessment of the said sum of Rs. 1,63,000 and odd under Sec. 4 (2) of the Income-tax Act as foreign profits received in British India, the assessee contended that there was no actual receipt of money in British India but only a book adjustment. The Commissioner held that having regard to the entry in the Madras accounts wiping out the assessee's indebtedness to the Madras Branch, coupled with the non-production of Kulalampur and Headquarters accounts, the said sum was a remittance of foreign profits. On a case stated by the Commissioner under Sec. 66 (3) on the question whether there was any legal evidence in support of his finding.

Held, that there was material legal evidence in support of the finding and its correctness or otherwise could not therefore be further questioned.

Case [Referred Case No. 11 of 1926] stated under section 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the Court, in compliance with the order of the High Court, dated the 9th March, 1926.

CASE.

As directed by the High Court in its order, dated 9th March 1926 (received by me on 1st April), I have the honour to submit under section 66 (1) of the Indian Income-tax Act the following question for the decision of the Hon'ble Judges:—

“Whether there is any legal evidence to support the finding that the entry in the books in Madras of K. V. A. L. Ramanathan Chettiar, the assessee herein, amounted to a payment of profits of the Kulalampur branch of Rs. 1,63,319-2-9”.

2. The facts of the case are set out in full in my order, dated 23rd October 1925 on pages 4—8 of the printed papers filed by the petitioners with their petition under section 45 of the Specific Relief Act.

3. I venture to submit that a perusal of paragraph 5 of my order of 23rd October and paragraph 5 of my order of 21st November will indicate that I am not basing this assessment on a finding that the entry in the books by itself amounted to a payment of profits of Kulalampur branch. What I am assessing is part of the sum of Rs. 2,50,000 remitted from Kulalampur on 17th and 29th Audi. Remittances came from Kulalampur. The burden of proving that they were capital and not profits is upon the assessee. In my opinion he has not discharged the burden. There are therefore *prima facie* grounds for holding that the remittances were from profits. I use the entry of 30th Audi as additional evidence that, of the remittances of Rs. 2,50,000, Rs. 1,63,319 were utilised for private purposes and therefore came from profits.

4. The point really at issue is, I think, whether the assessee has proved that all the remittances were utilised for business purposes. In support of his plea he has printed for the High Court an extract from his accounts showing that in the course of the period selected by him, Rs. 6,75,000 were received from Kulalampur, while Rs. 8,24,028 were paid in Madras on behalf of Kulalampur, chiefly on hundies drawn by Kulalampur on Madras and he argues that the extract shows that all the remittances must have been used to meet hundies. This argument is, I submit, fallacious. Assuming that the extract is correct as far as it goes and that no hundies were being drawn by Madras on Kulalampur I am of opinion that no conclusion can be drawn from an extract in a running account of this nature. The extract does not give the opening balance at the beginning of the year. It stops for some unknown reasons in Avani, i. e., September, instead of in Panguni, i. e., March. If the year is taken as a whole there is a credit of Rs. 1,32,478 in favour of Kulalampur instead of the debit of Rs. 1,49,028 shown in the extract. The dealings between Madras and Kulalampur are continuous and there is no practice of balancing the account in hard cash at any given date. The Madras branch can and does cash Kulalampur hundies without having any moneys from Kulalampur in its hands. It uses its own capital or capital borrowed locally. The fact remains that when the account between the two branches is eventually settled Kulalampur will have to send an additional Rs. 1,63,319 because Rs. 1,63,319 out of the sum of Rs. 2,50,000 remitted in Audi, Ruthrothkari were not utilised for the encashment of hundies but were utilised for personal expenses and credited in personal accounts.

5. I may add that the assesseees and their auditor, who is a skilled accountant, in the early stages of the case never disputed the contention that the adjustment in the accounts amounted to a remittance of money for the personal use of the assesseees. Their sole contention was that remittance was not from profits because there were no profits. This in itself, I think, rebuts their present plea that there was no remittance.

6. In the circumstances I am of opinion that the entry of 30th Audi is evidence that part of the sum remitted from Kulalampur just previous to that date was a remittance of profit.

ORDER UNDER S. 33.

This is a case which came to my notice during an inspection tour. As it seemed to me that there had been an obvious and a very serious under-assessment, I considered it necessary to revise the assessment under section 33 and I accordingly issued a notice to the assesseees informing them that I was of the opinion that the figure adopted by the Income-tax Officer for the Rangoon income was too low and that the Assistant Commissioner had wrongly exempted the sum of Rs. 1,76,301 being remittances from foreign businesses.

The facts of this case are as follows:—The assesseees are a Hindu undivided family carrying on business at Madras, Rangoon, Kulalampur, Penang and Malacca. They were originally called upon to make a return of their income on 31-8-24. On 22-8-24 the auditor Mr. N. S. Ramaswami Aiyar wrote applying for an extension of time till 15-11-24 to make a return. This was granted. On 9-11-24 the auditor wrote again asking for a further extension to 15-2-25 on the ground that the assesseees wished to have their Penang accounts audited also, and that these were in Courts and could not be produced immediately. This was granted till 31-1-25. On 27-11-24 the Income-tax Officer called upon the assesseees to produce their Rangoon accounts separately on 22-12-24, and he had heard from the Income-tax Officer, Rangoon, that the assesseees' agent at Rangoon had refused to produce the accounts there and that they had been taken to Madras. To this notice the assesseees replied on 19-11-24 asking for an extension for three months on the ground that the books were filed in civil courts in Rangoon. Time was granted till 31-1-25. On 3-1-25 the auditor submitted a Profit and Loss account for Madras with a report in which he said "Besides the usual transactions in the regular course of business, remittances to the extent of Rs. 1,76,000 have been credited by adjustment in the names of some of the members of the firm. The assesseees say that these remittances were out of capital. Anyhow I intend producing the books before you and leave the whole matter to your discretion". On 15-1-1925 the Income-tax Officer called for the books of Madras, Rangoon, Penang, Malacca and Kulalampur. The Madras and Malacca books were produced on 2-2-25. On 13-2-25 the assesseees filed a return saying that they did not receive any of their profits from foreign places and that remittances were out of capital alone. There was also a covering letter saying that the Penang and Kulalampur accounts had to be filed in courts in connection with "letters of administration" proceedings and that the accounts relating to Rangoon were filed in insolvency and other proceedings. The following passage also occurred: "It is true, as stated in the report by the auditor, that these were remittances (the word has since been altered to adjustments) to the extent of Rs. 1,76,000 from outside British India; but these were out of capital only." On the same date the Income-tax Officer made an assessment. The relevant portions of this order are as follows:—

"*Rangoon.*—The accounts of this branch are said to have been filed in a civil court in Burma. Last year the income from this source was estimated to be Rs. 30,000. I now put it at Rs. 35,000.

"*Other sources.*—The assesseees produced the accounts of their Malacca shop for the agency which began in Avani, Rowdri and ended in the month of Karthigai, Rakthakshi (Nov. 24). According to these accounts the agency resulted in a loss of Rs. 2,93,249. The result of the working for the period up to 30th Panguni, Rudrothkari (year of account) was a loss of Rs. 1,05,560. It is however found

that this loss is arrived at after payment of interest to the extent of Rs. 1,61,595 to the assessee's sole shops at Penang and Kulalampur. If the working of the Malacca shop is considered to be a loss the profits of the assessee's other shops must be correspondingly higher. The assessee did not produce the accounts of their shops at Penang and Kulalampur. It is a fact that they are required abroad in connection with the demise of the senior member of the family, Mr. Muthayya Chettiar and the consequent necessity of taking out letters of administration. The Madras accounts show that the assessee has been drawing considerable sums for their domestic expenses for a series of years. These were made good by crediting the assessee and debiting the Penang and Kulalampur shops. In the accounts of the foreign branches the corresponding entries will be by crediting Madras and debiting assessee. The effect of these entries is that money has been remitted from Penang and Kulalampur for the assessee's personal expenses. The amounts so drawn amount to Rs. 1,76,301. In 1922-23 and 1923-24 the assessee were not assessed on any income from foreign shops. There must at least be 3 years' profits available for remittance in the year of account. In the absence of the accounts of the foreign branches I take the sum of Rs. 1,76,301 to have been remitted from the profits of those branches."

2. An appeal was filed before the Assistant Commissioner pleading for the exclusion of the sum of Rs. 1,76,301 on the grounds that there had been a loss in the Straits and that the assessee had unfortunately been unable to produce their accounts owing to there being filed in courts in connection with 'letters of administration' proceedings. The appeal petition practically admitted the remittances and that they had been spent for private purposes but it was contended that loss had been suffered abroad and that the remittances were from capital. During the hearing of the appeal this position was apparently abandoned and it was urged that the sum of Rs. 1,76,301 could not be considered to be remittance and that there was not even a constructive receipt. The Assistant Commissioner cancelled the assessment on this sum, the relevant portion of his order being as follows:—"The facts of the case are that in previous years the petitioners had drawn largely from their Madras shop for their private expenses. They therefore became debtors to themselves in the Madras account in respect of this money which was used for their personal expenses. In the year of account this debt was transferred by a book adjustment from the Madras accounts to the Penang and Kulalampur shops. The question to be decided is whether the book adjustment constitutes a notional or constructive receipt into British India. That there had been no actual receipt of money in British India is undisputed. The Vakil argues that there can be no constructive receipt as no liability had been discharged and all that has been done is that the petitioners have transferred a debit against themselves from their Madras account to their Kulalampur and Penang accounts. There is a good deal of force in this argument and I agree with it. This book adjustment has not enabled the petitioners to discharge a sum of money or a liability due by them to any person in British India; it has merely shifted a personal debit against themselves from their Madras concern to their foreign concern."

3. After the appeal order some small point remained to be settled regarding the adjustment of interest. The Income-tax Officer took steps to revise the previous assessment accordingly under section 34 and in doing so called upon the assessee again to produce the Rangoon books and prove that their income for 1922-23 and 1923-24 had not been more than Rs. 30,000 and Rs. 35,000. This was done because the Rangoon Officer had reported that large profits had been made in Rangoon in these years. In reply the assessee wrote:—"Already, at the time of the original assessment and at the time of the appeal, we expressed our inability to produce our Rangoon accounts and assessment was finished without the same. We are yet labouring under the same difficulty and as such we would request you to finish our assessment in the light of the appeal order." It was also contended before the Income-tax Officer that the Rangoon income had been fully considered before and they should not be troubled unnecessarily. The Income-tax Officer therefore abandoned his proposed enhancement.

4. I do not think he was right in doing so. The assesseees have persistently refused to produce their Rangoon accounts either in Rangoon or here. I do not believe that they are required in courts for such a long time and am convinced that the accounts had been withheld, because it has paid the assesseees to do so. The assesseees' representative has been heard regarding my proposed enhancement. He had nothing very definite to say against it except to urge that the figure I suggested to him Rs. 1,00,000 was too high. Possibly, it is. Under section 33 I raise the estimate of the Rangoon income in the account year 1923-24 to Rs. 50,000.

5. As regards the remittances it is again urged that apart from a sum of Rs. 7,182 which is admitted to be a remittance of profit, there was only a book adjustment of the balance of Rs. 1,69,119 and that this did not enable the assessee to discharge any liability in British India. I have looked into the books of the Madras firm. The position is as follows:—At the beginning of the account year the personal accounts of the members of the family in the Madras shop showed large debits, *i.e.*, the members of the family had overdrawn. At the same time Penang and Kulalampur branches were indebted to the Madras branch to the extent of Rs. 20,571 and 7,397, respectively. During the course of the year there were remittances of Rs. 4,00,055 from Kulalampur to the Madras shop and Rs. 2,36,519 from Penang to the Madras firm. Sums were also going the other way from Madras to Kulalampur and Penang. Just prior to the date we have now to consider, *i.e.*, 30th Adi (14th August) there had been large remittances from Kulalampur by means of telegraphic transfers on the Chartered Bank and the balance stood in favour of Kulalampur. On the 30th of Adi an entry of Rs. 1,63,319 was made in favour of Madras, *i.e.*, the liability of the Madras branch to the Kulalampur branch was eliminated to that extent. About the same time the individual accounts of the members of the firm were credited with Rs. 70,123, Rs. 67,406 and Rs. 25,790, respectively, making a total of Rs. 1,63,319. Similarly for the sum of Rs. 5,800 the effect of these adjustments was that the Madras shop washed out its liability to Kulalampur, while at the same time the members of the family washed out their liability to Madras. This seems to me to amount to the same thing as saying that the members of the family discharged their old over-drafts at Madras by moneys from Kulalampur. The assesseees' vakil has argued that there has been no remittance and no discharge of liability. He refers me to various English cases, particularly the case of *Gresham Life Assurance Society v. Bishop*,⁽¹⁾ I do not see that the judgments in that case have any bearing on the present case, for in this case there have been actual remittances of what is equivalent to cash. On the 17th of Adi, *i.e.*, 13 days prior to the adjustment now under consideration there was a telegraphic transfer received from Kulalampur on the Chartered Bank for Rs. 1,50,000. On that day another Rs. 50,000 was sent from Kulalampur also by telegraphic transfer on the Chartered Bank. On the 29th of Adi, *i.e.*, the day before the adjustment another Rs. 50,000 was sent from Kulalampur account by telegraphic transfer on the Chartered Bank. These telegraphic transfers which enabled the assesseees to go straight to the Bank and draw the money surely come within the scope of Lord Lindley's remarks on page 476. By these three transactions the assesseees received in Madras a sum of Rs. 2,50,000 from their Kulalampur firm. In the course of the year there were actual remittances of Rs. 6,36,574 from Kulalampur and Penang. It might be possible for me to call upon the assessee to prove that the whole of these were remittances of capital. I do not do so, for I believe that a part of the remittances represent money going to and from in the ordinary course of business. I only use the evidence of the adjustments on 14th August as an indication that a part of these total remittances, *viz.*, 1,69,119 were used to pay for the personal expenses of the family and therefore came out of profits and not out of capital. It has been definitely held that where there are remittances—which there are in this case—the burden of proof that they came from capital and not from profits is on the assessee. In this case we have the additional point that the remittances now in question, *viz.*, 1,63,319 plus 5,800 were used to wash out the overdrawals by

the family, i.e., they were used for private purposes. The presumption that the remittances were from profits is therefore all the greater. That presumption can be rebutted by the assessee producing their Kulalampur and Penang accounts to show that there were no profits there. They say they cannot, but I do not believe them. The plea that accounts are required for letters of administration proceedings would apply equally to the Malacca accounts, yet they have been produced for a year in which they show a loss. I hold that the Kulalampur and Penang accounts are being wilfully withheld and that, therefore, I am entitled to find that the sum of Rs. 1,69,119 which came from Kulalampur and which has been used for private purposes was a remittance of foreign profits. Adding this sum of Rs. 1,69,119 to the sum of Rs. 7,192 which has been admitted to be assessable, under section 33 I enhance the assessment made upon the assessee for 1924-25 by Rs. 1,76,301.

6. The tax due on revision amounts to Rs. 41,214-4-0. Deducting the sum of Rs. 4,462-10-0 already paid the balance due is Rs. 36,751-10-0.

Nugent Grant, for *M. Subbaroya Aiyar*, for the assessee.

M. Patanjali Sastriar, for the Crown.

JUDGMENT.

The question referred by the Commissioner of Income-tax to the decision of the High Court is as follows :

"Whether there is any legal evidence to support the finding that the entry in the books in Madras of K. V. A. L. Ramanathan Chettiar, the assessee herein, amounted to a payment of profits of the Kulalampur branch of Rs. 1,63,319-2-0."

Mr. Grant, the learned Counsel for the assessee, argued the matter as though the question before us was whether a mere adjustment in the books of account can be treated as amounting to a receipt of profits when such adjustment is *prima facie* a mere notional receipt and is inconsistent with an actual receipt and further that the sums of money received from Kulalampur were really used not to wash out the assessee's overdrafts but to meet the hundies drawn from Kulalampur and that therefore there was in fact no receipt of any monies as profits from Kulalampur. On such an argument on the facts, we at first felt inclined to agree with the contention on behalf of the assessee that on the state of the accounts produced, there was great difficulty in finding it as proved that there was receipt of monies at Madras from Kulalampur as profits of business carried on at Kulalampur. The facts are all either practically admitted or beyond question.

The assessee went on drawing from their Madras shop considerable sums of money from time to time for their personal expenses. The total of these amounts representing somewhere about Rs. 1,70,000 odd on or about the 14th August during the assessment year 1924-25 was credited to the drawings account by the corresponding debit to the Kulalampur shop account in the Madras business. Between Kulalampur and Madras shops there were dealings which consisted in the former drawing hundies for large sums of money from time to time payable by the Madras shop and large remittances being made also from the latter place to the former from time to time for the purpose of meeting such hundies.

It is not the case, however, that the remittances from Kulalampur were for the exact amounts of the hundies or that the accounts of the remittances and the hundies always corresponded. The account was a mere running account. On this the Commissioner of Income-tax levied an assessment on

the assessees treating Rs. 1,63,319-2-0 as the profits received at Madras from Kulalampur. When the Commissioner was asked to refer the question of the liability of the assessees for assessment in respect of the said item, he refused to do so, and it was thereupon on an application to this Court that he was directed by a Bench of three Judges of this Court to refer the question propounded as above set out.

The form of the question for decision being merely whether there is any legal evidence to support the finding arrived at by the Commissioner, it precludes us from going into or considering the correctness or propriety of the finding of the Commissioner on the facts. In fact, it seems to us that the question itself could not have been framed in any other manner, because it is obvious that when what is questioned related to such a fact as the receipt of profits, the only question of law that can arise for reference is the existence or not of some legal evidence to support the finding. To a question so propounded, it is clear that in this case there could only be one answer. It is impossible to say that there was no legal evidence before the Commissioner to support the finding he arrived at. The entry in the books at Madras was an entry that had the effect of wiping out the indebtedness to the Madras shop of the assessees in respect of their drawings for personal expenses. Such a circumstance is by itself sufficient to indicate, as observed by the Commissioner, that the wiping out of drawings made for personal expenses could only have been by appropriation or setting off of profits made in business. It appears from the accounts that monies were remitted from time to time from Kulalampur and if it was shown that *prima facie* these monies were being remitted for the purpose of paying off hundies drawn from time to time by Kulalampur on Madras, the mere remittances of such monies may not be regarded as remittances of profits. But if in such an account of remittances an item is introduced which could *prima facie* be regarded as an entry relating to appropriations of profits, it would be impossible to say that it is not legal evidence of the receipt of profits from Kulalampur. As decided by this Court in the case of *In re A. V. P. M. R. M. Murugappa Chettiar* ⁽¹⁾ following the case of *Scottish Provident Institution v. Allan* ⁽²⁾, where there are remittances of money from foreign parts and the circumstances are such as to show that they may possibly be towards the profits, the burden of proving that it was capital lies on the assessee. The fact of such an entry in the books was regarded, we cannot say improperly, by the Commissioner as evidence of the receipt of profits. Mr. Grant has tried to explain away the entry but it cannot possibly be contended that even if we should be willing to accept the explanation of Mr. Grant which we do not, the entry is not legal evidence which the Commissioner is not entitled to consider.

Apart from the account books of Kulalampur the non-production of which was attempted to be explained, and those of Malaya of which there was a belated production, there was the undoubted and unexplained non-production of the account books of the head-quarters in India, and it is impossible to say that that was not also a circumstance which the Commissioner was entitled to take into consideration. It is possible that if the question had been framed otherwise there might have been difficulties in coming to a satisfactory decision in the matter, having regard to all the circumstances. But the question propounded being what it is, we are satisfied that it is impossible to contend that there has been no legal evidence whatever before the Commissioner to support his finding. For it is clear that though the question, whether there is

1. 2 I T C 139.

2. (1903) A C 129; 4 Tax Cas. 591.

any legal evidence or not to support the finding may be a question of law, still if it should be found that there is such legal evidence, the correctness or otherwise of the finding cannot further be questioned.

Our answer therefore to the question propounded can only be in the affirmative and we hold that there was material legal evidence before the Commissioner to support his finding. The assessee will pay the Commissioner of Income-tax the costs of this reference, Rs. 250 plus Rs. 5-8-0, in all Rs. 255-8-0.

[186] IN THE COURT OF THE JUDICIAL COMMISSIONER,
NAGPUR.

Before Mr. Findlay, Judicial Commissioner.

[17th March, 1927.]

Bhikaji Vyankatesh Dravid & Co. !

... Assessee*

v.

The Commissioner of Income-tax, Nagpur.

Income-tax Act (XI of 1922), Ss. 66 (3) and 23 (2)—Losses claimed by assessee—Disallowance by Income-tax Officer—Onus of proof—Statement of losses in return and on oath—Decision of Income-tax Officer, if erroneous in law—Reference to Court.

On an assessment of the firm of B. V. Dravid & Co., certain losses debited in their accounts were disallowed by the Income-tax Officer who held that those losses were the concern of B. V. Dravid in his personal capacity and not the firm's. In the verified return as well as in the oral statement on oath before the Officer, those losses were stated as the firm's losses and were so entered in the firm's account books. On an application under section 66 (3) of the Income-tax Act for stating a case on the ground that the Income-tax Officer erred in holding that the losses were not the firm's losses,

Held, that having regard to the circumstances regarding the debit entries and the failure to discharge the onus by producing other evidence in support of the allegations, it could not be said that there was an error or mistake of law on the part of the Income-tax Officer justifying the calling for a reference from the Commissioner of Income-tax. *In re Bishnu Priya Chowdhurani*, 1 I. T. C. 261, Referred to.

Application [Miscellaneous Application No. 13-B of 1926] made under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax to state a case for the opinion of the High Court.

G. L. Subhedar and R. R. Jaywant, for the assesseees.

G. P. Dick, for the Crown.

JUDGMENT.

The applicant Rao Sahib Bhikaji Vyankatesh Dravid & Co. has applied to this Court for a mandamus requiring the Commissioner of Income-tax to state a case under section 66, sub-section (2), Indian Income-tax Act, 1922, for decision by this Court.

The facts of the case are sufficiently given in the application and need not be repeated here. On the application coming on for hearing to-day, only the first point contained in the final paragraph of the application was pressed. The case for the applicant company in this connexion is that, in the verified return submitted by the applicant as well as in his statement on oath made before the Income-tax Officer on 20th September, 1925, certain losses were shown as debitable to the partnership concerned, whereas the Assessing Officer held that these losses were the concern of Rao Sahib B. V. Dravid in his personal capacity. The alleged legal point which is raised on behalf of the applicants is that in the present case we had the certified statement of the applicant, as well as his oral statement on oath to the opposite effect. In addition there were the entries in the partnership account books for the year in question. On behalf

of the Income-tax authorities, it is alleged there was no evidence on the other side. It is urged that the Income-tax authorities have, in these circumstances, erred in law in holding that the transactions in question were personal ones and should not have been incorporated in the partnership account. In support of this position, the decision of Sanderson, C. J., in *Bishnu Priya Chowdhurani, In re* ⁽¹⁾ has been relied on. In that case an assessee had stated that he had derived no income from certain lands. The Assistant Commissioner of Income-tax required the assessee to prove his negative assertion and, in the absence of such proof, the assessment was confirmed. Sanderson, C. J., in the said case, held that the ordinary principle of evidence applied and that the burden of proof was on the party which would fail if no evidence were produced, i.e., in the said case, on the officers of the Income-tax Department.

The present case, however, seems to me to be clearly distinguishable from the Calcutta case referred to. Here the facts are that up to the year we are concerned with the connected transactions relating to analogous debits took place on the applicant's private account. This is admittedly so, but the explanation offered by the applicant is that in the year in question there had been no combination of ginning factories as there had been in previous years, and it was owing to this that the applicant carried on purchases for the partnership and not, as in previous years, on his own personal account. Moreover, it was apparently not until the end of the year that the debits in question were made in the partnership account. In these circumstances, it seems to me impossible to hold that there was no evidence on the side of the Government to favour the view that items of debit were wrongly incorporated in the partnership account. Moreover, under section 23 (2), Income-tax Act, 1922, the Income-tax Officer had power to call on the assessee to produce evidence on which he relied in support of the return. Notice to this effect was issued to the assessee on the 20th September, 1925, but he apparently produced no other evidence except that of himself. A somewhat unsatisfactory explanation is given that the applicant could not produce D. G. Dravid as a witness as he would have proved hostile to him, but presumably, had this been the case, the Income-tax Commissioner would have allowed him to have been cross-examined by the applicant. I do not, therefore, think that it can be predicated of the present case that there was an error or mistake of law on the part of the Income-tax Officer.

The circumstances of the case as regards the debiting of these items in the personal account were not free from suspicion. The Income-tax Officer was perfectly entitled to draw a presumption from the state of matters which had admittedly existed in previous years, and in the present state of Income-tax law an onus rested on the assessee of discharging his contention that the debits were properly made in the partnership accounts as opposed to being personal ones of his own. That onus was not sufficiently discharged by his verified return and statement on oath, and he failed to make any use of the opportunity given to him of producing other evidence in support of his allegation. The case from this point of view seems clearly outside the purview of the principle laid down in the Calcutta decision quoted above, and it seems to me impossible to hold in the circumstances that any error of law has been committed by the Income-tax authorities which would justify my calling on the Commissioner of Income-tax for a reference to this Court.

The application is accordingly dismissed. I allow Rs. 50 as pleader's fees. The applicant must bear the non-applicant's costs.

[187] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and
Mr. Justice Srinivasa Aiyangar.*

[23rd March, 1927.]

The Mangalore Roman Catholic Provident Fund

... Assessee

v.

The Commissioner of Income-tax, Madras

... Referring Officer.

*Income-tax Act (XI of 1922), S. 66 (2)—Mutual Life Assurance Companies—
Method of assessment—Mangalore Roman Catholic Provident Fund.*

At the hearing, the vakil for the assessee elected not to proceed with the Reference which was therefore returned unanswered.

Case [Referred Case No. 5 of 1926] stated under S. 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court as to the correct method of assessing the Mangalore Roman Catholic Provident Fund in the circumstances stated in the case.

CASE.

Under S. 66 (2) of the Indian Income-tax Act, 1922, I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court.

2. The Mangalore Roman Catholic Provident Fund is a Mutual Life Assurance Association, i.e., those that insure their lives with the Association and take out policies become members of the Association and have a voice in its management. There are no proprietors or shareholders apart from the policy holders. The capital of the Association consists of premia paid by the policy holders and sundry collections from them such as entrance fees and default fines. The income of the Association is derived from investments of its capital in Government securities and on mortgages of immovable properties, etc. The nominees of the policy holders are paid certain fixed sums on the maturity of policies and the rules provide that any surplus found on the winding up of the Association should be divided among the members then on the roll. A copy of the Rules of the Association is appended as Exhibit A. The Association has not been registered under the Indian Companies Act (VII of 1913). It has, however, been treated as a Life Assurance Company to which the provisions of the Indian Life Assurance Companies Act (VI of 1912) apply and as such its assets and liabilities are subject to periodical actuarial valuation.

3. For the Income-tax assessment of the year 1924-25, the Association returned a taxable income of Rs. 3,795 on the basis of profits disclosed by the actuarial valuation for the five years ended 31st December 1923. (It may be noted that this figure was arrived at after deducting a special reserve of Rs. 40,000.) It is doubtful whether this deduction is permissible. In making this return the Association assumed that Rule 25 of the Rules framed under the Income-tax Act, 1922, applied to its assessment. The Income-tax Officer was, however, of opinion that the rule only applied to proprietary Life Assurance Companies and that a Mutual Benefit Society like the Association in question was liable to pay tax only on the income derived by it from its dealings with outsiders, as decided by a Full Bench of the Madras High Court in the case of the *Mylapore Hindu Permanent Fund* ⁽¹⁾ following the decision of the House of Lords in the case of *New York Life Insurance Company v. Styles* ⁽²⁾. He therefore asked the Association to file a revised return. The Association did so and according to the revised return the income derived by it from deal-

(1) 1 I. T. C. 217.

(2) (1889) 14 App. Cas. 381; 2 Tax Cas. 460.

ings with outsiders amounted to Rs. 17,738. The Income-tax Officer deducted from this the interest on Government securities either tax free or taxed at source and fixed the taxable income at Rs. 14,478. He levied tax on this amount at the maximum rate of 0-1-6 in the rupee treating the Association as a 'Company' as defined by section 2 (6) of the Income-tax Act. For the assessment of the year 1925-26 the Association filed a similar return which showed a total income of Rs. 20,568 and a taxable income of Rs. 17,308. The Income-tax Officer levied tax accordingly. The Association appealed to the Assistant Commissioner on the grounds that the assessments should have been made in accordance with the method indicated in Rule 25 of the Income-tax Rules, as the Rules make no distinction between ordinary Life Assurance Companies and Mutual Life Assurance Companies and that, in any case, the interest earned on investments should not all be treated as profits as part of it goes back to the policy holders in reduction of premia. The Assistant Commissioner overruled the contentions for the reasons that in the light of the High Court's decision in the case of the *Mylapore Hindu Permanent Fund* ⁽¹⁾ the ordinary method of computing business profits could not be applied to Mutual Benefit Societies like the Association in question and that, as the policy holders of the Association are themselves the proprietors, any benefit derived by them or payment made to them cannot be treated as a legitimate deduction from the gross income of the Association. He, however, excluded from the assessments the interest of Rs. 312 on Mysore Government loan which accrued outside British India and allowed a sum of Rs. 1000 as charges necessary to earn the income taxed. The total income for 1924-25 was thus reduced to Rs. 16,426 and the taxable income to Rs. 13,478. For 1925-26 the total income was reduced to Rs. 19,256 and the taxable income to Rs. 16,308. The Assistant Commissioner also treated the Association as an "Association of individuals" as it was not a "Company" within the meaning of the Income-tax Act and ordered that tax should be levied at the rate applicable to the total income, *viz.*, 9 pies in the rupee.

4. The Association has applied for a reference to the High Court under section 66 (2) of the Income-tax Act. On the facts stated above, the question of law that arises for decision is :

What is the correct method of assessment in this case?

Should the fund be assessed

- (a) according to Rule 25 of the Income-tax Rules on the average profits as disclosed by the last preceding actuarial valuation, or
- (b) following the decision of the Madras High Court in the case of the *Mylapore Hindu Permanent Fund* ⁽¹⁾ should the assessment be made direct on the interest earned from outside investments, other profits or losses arising from transactions with members being ignored.

The Fund's Vakil has agreed to the case being referred in these terms.

5. I am of opinion that the second is the correct method of assessment in this case. If it were held that Rule 25 could be applied to the Mangalore Roman Catholic Provident Fund, there would be a conflict between that rule and the decision in the *Mylapore Fund* case, 'for the actuarial valuation undoubtedly does take into consideration profits earned from members. It seems to me, however, that Rule 25 cannot be applied in this case, firstly because this Fund is not a company within the definition given in section 2 (6) of the Income-tax Act, as it has not been formed or registered under any statute, and

secondly because the Fund, even if it is a "Company" is not an "incorporated Company". I therefore consider that the assessment as made by the Assistant Commissioner, i.e., on the outside profits, is correct.

B. Sitarama Rao, for the assessees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

Mr. Sitarama Rao has frankly told us that the questions as framed are not capable of being answered in any manner that could assist his case in any way. He apparently suggests that had different questions been framed he might have been able to raise contentions favourable to his client; but he does not deny that no such questions have been framed. He has therefore very wisely elected to drop this reference and not to press for any answers to any of the questions at all, reserving for himself the opportunity to raise questions that he thinks really material in the case to some future occasion. As we are not now asked to furnish answers to the reference, the assessee will have to pay the costs of the Commissioner. Counsel's fee Rs. 150.

[188] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and Mr. Justice Srinivasa Aiyangar.

[23rd March, 1927.]

S. K. R. S. L. Firm, Sivaganga Circle, Okkur

.. Assessee*

v.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 4 (2)—Foreign profits, assessment of—Profits earned during a period of years—Remittance, if presumable to be from earlier profits—Burden of proof.

Where an assessee has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, there is no presumption that a remittance made to him in British India of a sum which might fall within either set of profits is made from the earlier profits and not from the later.

On an assessment of foreign profits under Sec. 4 (2) of the Income-tax Act, the burden of proving that the profits sought to be assessed accrued or arose more than three years prior to the year of remittance into British India is upon the assessee.

Case [Referred Case No. 10 of 1926] stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the decision of the Court in pursuance of the order of the High Court dated 9th March 1926.

CASE.

As directed by the High Court in their order of 9th March received by me on 8th April, I have the honour to submit under section 66 (1) of the Income-tax Act the following question for the decision of the Hon'ble Judges.

"When a man has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, is there any presumption that a remittance made to him in British India of a sum which might fall in either set of profits is made from the earlier profits and not from the later."

2. The essential facts of the case may be stated very briefly. Indeed they are embodied in the question set out above. The assessee has a business in Ceylon the profits of which were standing to his credit there about Rs. 89,552 earned subsequent to March 1920 together with about Rs. 77,524 earned prior

* (1927) 50 Mad. 853; 53 M L J 416; 26 L W 123; 104 Ind. Cas. 352; A I R (1927) Mad. 772.

to that date. During the year of account, *viz.*, on 31st August 1923, a remittance of profits to the extent of Rs. 50,000 was made from Colombo to Rangoon. That remittance is taxable under section 4 (2) if the profits remitted were earned subsequent to March 1920. It is not taxable if the remittance came from profits earned prior to April 1920. There is nothing in the facts of the case to show definitely which profits yielded the remittance. The full facts of the case are given in the first five paragraphs of my order of 19th November. These paragraphs are appended as Exhibit A.

3. The assessee holds, I understand, on the authority of *Clayton's case* ⁽¹⁾ that there is a presumption that the remittance came from the earlier profits. I am of opinion that *Clayton's case* ⁽¹⁾ is inapplicable and that there is a presumption that the remittance came from the later profits. To my mind this case is covered by the case of the *Scottish Provident Institution v. Allan* ⁽²⁾ where it was held that there is a presumption that a remittance is from income rather than from capital. Now profits of one year, if they are not spent, become capital of the next year. All the profits of the years prior to the year of account have become capital and would not be assessable but for the special provisions in section 4 (2) which enable us to tax what would otherwise be capital. The distinction to be drawn in this case is therefore really one between capital and income and not one between older and newer profits. Applying the *Scottish Provident Institution* ⁽²⁾ decision to the special circumstances of India in which four years' profits are to be deemed to be income, I am of opinion that there is a legal presumption that the remittance came from the later profits rather than from the earlier.

EXHIBIT A.

This is a case in which I considered that there had been an under-assessment and in which I therefore called for the records under section 33. The history of the case is as follows. The firm of S. K. R. S. L., was originally assessed under section 23 (4) for failure to make a return of income and produce accounts, to a tax of Rs. 39,962-8-0. A petition was put in under S. 27 which the Income-tax Officer dismissed. An appeal was then filed before the Assistant Commissioner who held that as the return was only about a day late, as the estimate was high and as the assessee had taken the trouble to bring their books from Rangoon, the assessment should be re-opened. This was done and a tax of Rs. 21,292-5-0 was imposed under section 23 (3). On appeal to the Assistant Commissioner the tax was reduced to Rs. 1,855-8-0. There were two points on which I considered that the Assistant Commissioner had gone wrong and I accordingly issued a notice under section 33 to the assessee and have heard their pleader.

2. The first point relates to a remittance from Colombo. I find the facts of the case to be as follows: In the course of their money-lending and rice trade, the assessee were constantly sending remittances to and forward between Colombo and British India. These remittances together with various adjustments were, of course, entered in the accounts kept at Colombo, and Rangoon. On 31st August 1923, *i.e.*, in the middle of the year of account, a sum of Rs. 50,000 was entered in the accounts as having been transferred to Rangoon. The question is whether this sum of Rs. 50,000 can be taxed as a remittance of profit. It is not now disputed that there were genuine remittances between Colombo and British India and therefore no question of actual or constructive receipt arises. The point really for decision is whether the adjustment entry made on 31st August is any indication that the Rs. 50,000

(1) (1815) 1 Mer. 530. (2) 4 Tax. Cas. 591; (1903) A C 129.

out of the remittances is or is not a remittance of profits. In deciding this point it must first be ascertained whether there were any profits available at Colombo for remittance to India. Now at Colombo there were three accounts running which have to be considered. The first began in February, 1917 and was closed in October, 1921. The second began in January, 1920 and has not yet been closed. The third new account began in January 1923, and is, of course, still running. The first account had yielded a profit of about Rs. 11,000. It is contended that the bulk of this profit had been made prior to April, 1918 and that since April, 1918, there had been a loss of Rs. 28,766. The second account, up till March 1924, had resulted in a profit of Rs. 88,700. The third account, up till the end of the year under consideration, had made a small profit of Rs. 852. The Income-tax Officer therefore held that the profit available for remittance was Rs. 89,552, i.e., the profits of the second and third agencies. During the course of the appeal proceedings it was admitted by the department that the loss made in the first account after April, 1918 should be deducted before arriving at the profits available for remittance. I do not consider that this concession was necessary. The loss in that period may well have been adjusted against earlier profits. The matter is, however, of no great importance for even allowing the deduction of Rs. 28,766, there is a profit of Rs. 51,786 available for remittance and that profit is greater than the actual sum which it is proposed to tax. The Vakil for the assessee, while admitting the general legal presumption that, if profits are available, a remittance must be held to include profits until the contrary is proved, claims that in this case he has rebutted that presumption. At Colombo a current account is kept of the transactions between the headquarters of the firm and the Colombo branch. At the beginning of 1918-1919, there was a balance in favour of headquarters of Rs. 44,748 consisting of old profits. During the continuance of the first agency money was going backwards and forwards between headquarters, Rangoon and Colombo and at the end of the agency the balance in favour of headquarters stood at Rs. 1,48,475 including an entry of Rs. 66,244 being the profits of a still earlier agency. The second agency therefore opened with a balance of Rs. 1,48,475 in favour of headquarters. It has not yet been definitely closed but the balance of Rs. 1,30,987 has been carried forward to the new account on 31st March 1923. This balance includes the profits of the first agency Rs. 11,280, which was adjusted on 3rd February 1923. The third agency account opens on 1st April 1923 with a credit balance of Rs. 1,30,987 in favour of headquarters and closes on 31st December with a balance in favour of headquarters of Rs. 88,709 which was then transferred to the accounts of the three individual partners because a partition was being effected. It has been asserted that there is no credit in the last agency account for the profits of the second agency and that the Rs. 50,000 which was transferred to Rangoon on 31st August 1923 is debited in this latest agency account. It is argued therefore that as the profits of Rs. 51,786 or Rs. 89,552 have not yet been credited in the third agency account while the profits of the earlier agencies have been so credited it must be taken that the remittance of Rs. 50,000 came out of the profits of the older agencies which have now become capital through the efflux of time and that therefore the ordinary presumption is rebutted. I cannot accept this view. In the first place, the interest on partner's capital which makes up part of the profits of the second agency, has been adjusted in the current account in the third agency, so that in any event that portion of the profits, viz., Rs. 36,800 is obviously taxable. But I am not prepared to admit that the balance of Rs. 13,200 is not taxable. The position is simply that of a man who is running one single account between his foreign branch and his branch in India. That account includes both capital and income. He has income at his disposal in the foreign branch but refrains from entering the whole of it in

that current account. I cannot concede that the omission to make the entry has any bearing whatever on the question whether a remittance did or did not come from profits. If the assessee's present contention were admitted it would be easy for every Nattukottai Chetty trading abroad to escape assessment by the simple device of keeping his profits out of the accounts which he produces before the Income-tax Department until they are more than four years old.

3. Another argument for holding that the adjustment of Rs. 50,000 on 31st August 1923 is good proof that remittances to that extent were from profits is supplied by the ledger showing the transactions between headquarters at Okkur and Rangoon in 1923-24. Immediately after the Rs. 50,000 had been entered as transferred from Colombo a sum of Rs. 29,059 was spent by the partners on private charities while a sum of Rs. 32,948 was used to clear off the overdrawals made by them in their Mannargudi branch.

4. It has further been argued before me that the presumption that the second agency profits of Rs. 88,700 were included in the remittance of Rs. 50,000 is also rebutted by the fact that there were doubtful debts outstanding to the extent of Rs. 52,264. The plea is that if a man has some old profits on which he may draw with safety he will not draw upon recent profits of a doubtful nature. I do not think there is anything in this argument. There certainly appear to be debts to the value of Rs. 52,264 outstanding but it has not been proved that they are irrecoverable or even of doubtful value. The debts may have been left uncollected because the security was good. These debts have not been written off even on 31st March 1925. On 31st August 1923, therefore, they remain on the books as a sound credit upon which the partners could draw.

5. The petitioners' vakil asked me, if I did not accept his contention, to state a case to the High Court. I am not prepared to do so as I do not see that any point of law is involved. The only legal proposition on which I am relying is that there is a presumption that a remittance is from income until the assessee proves the contrary. That proposition is supported by the case of *Scottish Provident Institution v. Allan*¹. The question now at issue is whether the assessee has rebutted the presumption. That is a question of fact and I find from a study of the accounts that there is nothing in them to show that the remittances must have been made from capital or old profits not liable to taxation and that on the contrary the accounts indicate that the remittances were from recently acquired profits. The assessment will accordingly be enhanced by the inclusion of Rs. 50,000 under the head "Remittances".

* * * * *

K. S. Krishnaswamy Aiyangar, instructed by *K. S. Rajagopalachari*, for the assessee.

M. Patanjali Sastri for the Crown.

JUDGMENT.

The question referred to us is in the following terms:—

"When a man has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, is there any presumption that a remittance made to him in British India for a sum which might fall in either set of profits is made from the earlier profits and not from the later."

Under section 4 (2) of the Act profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose. That appears to us to be a clear intimation that sums remitted to British India are to be deemed to have accrued or arisen in the year of remission unless they accrued or arose more than three years before. We entertain no doubt that the effect of that must be to cast upon the assessee the burden of proving that the profits accrued or arose more than three years back, a matter after all peculiarly within his knowledge and not within the knowledge of the Income-tax authorities. That is our answer to the reference and it is clear that the Commissioner acted on that principle; and whether he came to a right conclusion of fact in the light of it or not is not for us. It is no doubt true that, in appending reasons for his own opinion on the point he was referring as he is directed under the Act to do, he enounced some very dubious propositions of law. That does not alter the position that in paragraph 5 of his review order he dealt with the question of fact unvitiated by any such misdirection of himself and dealt with it adversely to the assessee. The answer to the reference is in the negative.

The assessee must pay Rs. 250 for the costs of the Commissioner.

[189] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Wallace and Mr. Justice Beasley.

[27th April, 1927.]

Linga Reddi

v.

.. Assessee*

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 2 (1)—Agricultural income—Licensee of salt pans—Income from production of salt on the leased lands—If agricultural income.

The income of an assessee, a licensee of a salt factory, from the production of salt by flooding the land with sea water and extracting salt by elimination of the other chemical constituents, is not "agricultural income" as defined in Sec. 2 (1) of the Income-tax Act.

Case [Referred Case No. 2 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the Court.

CASE.

Under section 66 (2) 'I have the honour to refer for the opinion of the High Court the question whether income from the production of salt is agricultural income within the meaning of section 2 (1) of the Income-tax Act.

2. The petitioner is a licensee of the Krishnapatam Salt Factory in Nellore District. In the year of account (1924-25) he made a profit of Rs. 7,012 from salt manufacture. The question is whether this income is liable to income-tax.

3. In my opinion, income derived from the production of salt cannot be held to be agricultural income. In order that that income should come within

* (1927) 150 Mad. 763; 53 M. L. J. 377; 26 L. W. 239; 104 Ind. Cas. 703; A. I. R. (1927) Mad. 848.

the exemption mentioned in section 4 (3) (viii) of the Act it must be "revenue derived from land which is used for agricultural purposes". I do not consider that land used for the cultivation of salt can be held to be land used for agricultural purposes. Moreover the salt which produces the income is in no sense derived from land. Common salt or sodium chloride is derived in Madras from the waters of the sea. In the Bay of Bengal the constituents of sea water are :

26.06	Sodium Chloride
2.81	Magnesium „
1.20	Potassium „
1.82	Magnesium Sulphate
1.36	Calcium „ and
966.75	Water.

The whole process of manufacture consists in the separation of the sodium chloride from the other constituents of the sea. The salt factory is situated close to an estuary from which the water of the sea is led in channels to the edge of the factory. It is then baled into condensers in which the first process of evaporation takes place. As the sea water increases in density through the action of the sun's heat, the Calcium Sulphates contained in it are separated and sink to the bottom of the condensers. The brine is then led into a series of crystallizers in which further evaporation takes place. When it has reached a density of 25° Beaume, the sea water being then reduced to 1/10th of its original bulk, the sodium chloride or common salt is deposited and is scraped and stored for sale. The residue of the brine together with the magnesium salts contained in it is then drained off. It will be seen that the whole of the commodity which yields the profit is derived from sea water and not in the slightest degree from the land on which the crystallizers are situated. The only processes ever performed on the land during the course of salt manufacture are an occasional ploughing at the beginning of the season to destroy crab holes and subsequent stamping down of the soil to make it hard and prevent percolation of the brine. I do not consider that these processes warrant a finding that the income is derived from the land. The land comprising the salt pans is merely a place of storage of the commodity, *viz.*, sea water, which yields the income.

T. V. Venkatarama Aiyar, for the assessee.

M. Patanjali Sastri for the Crown.

JUDGMENT.

THE CHIEF JUSTICE.—In my opinion this case is unarguable. The assessee was a licensee of the Krishnapatam Salt Factory in the Nellore District. From the manufacture of salt on the land of which he was the lessee he made a profit of some Rs. 7,000 which has been assessed to income-tax. He now contends that this is agricultural income, that it is revenue derived from the land which is used for agricultural purposes and therefore not taxable. To my mind it would be a gross misnomer to hold that 'agricultural purposes' could be held to cover the process of flooding the land occupied by letting in the sea water and then extracting the sodium chloride from it by eliminating the other chemical constituents. In my opinion the assessment was right and must be confirmed. The answer to the specific question referred is in the negative. The assessee will pay the costs of this reference. Counsel's fee Rs. 250.

WALLACE, J.—I agree.

BEASLEY, J.—I agree.

[190] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

*Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Wallace
and Mr. Justice Beasley.*

[4th May, 1927.]

A. T. K. P. L. S. P. Subramanyam Chettiar Assessee *

v.

The Commissioner of Income-tax, Madras Referring Officer.

Income-tax Act (XI of 1922), Secs. 4 (1) (2), 10 and 13—Assessee carrying on individual business in Rangoon and partnership business in Penang—Transfer of funds from Rangoon to Penang—Entry of interest in Rangoon accounts in respect of transferred funds—Mercantile system of accountancy—Assessability of the interest as profits of the Rangoon business.

The assessee carrying on a money-lending business of his own in Rangoon and another business in partnership with third parties in Penang, transferred a sum of Rs. 78,768 in cash from the Rangoon business to the Penang business. In the books of the Rangoon business a sum of Rs. 12,174 was entered as interest on that money from Penang. On an assessment of this sum of Rs. 12,174 as profits of the Rangoon business, the assessee disputed the liability on the ground that the crediting of interest in the Rangoon books was a book entry of interest earned in Penang outside British India and that there was no receipt of this amount in British India within the meaning of Section 4 (2) of the Income-tax Act. It was found by the Commissioner of Income-tax that the assessee adopted the mercantile system of accountancy and that interest *chittas* were sent to Penang in respect of this interest amount.

Held, that the assessee having adopted the mercantile system of accountancy must be assessed upon that basis alone and so assessed, the amount of interest entered in the accounts as a profit and as money actually received like other interest entries, was income accruing or arising within British India within the meaning of Section 4 (1) read with Sections 10 and 13 of the Income-tax Act.

Gresham Life Assurance Society v. Bishop, (1902) A. C. 287, referred to.

Case [Referred Case No. 8 of 1926] stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in pursuance of the order of the High Court in O.S.A. No. 89 of 1924, dated 12th January 1926, calling on the Commissioner to refer the question of law in the case to the High Court.

CASE.

In compliance with the above order, I have the honour to refer the following case for the opinion of the Hon'ble the Judges of the High Court.

2. The petitioner is a banker resident at Sirukudalpatti in the Ramnad District. He carries on banking business at Sirukudalpatti and also at Rangoon. These businesses belong solely to him, that at Rangoon being managed by an agent acting under his orders. He is also the chief partner in a money-lending firm at Penang in the Straits Settlements.

3. The petitioner is maintaining his accounts on the commercial or mercantile basis. According to this method credits and debits are entered in the accounts not on the basis of the actual receipts and disbursements in the course of business but on the date of the transactions themselves irrespective of the date of payment. The profits and gains of an assessee who keeps his accounts

*(1927) 50 Mad. 765; 53 M. L. J. 379; 26 L. W. 223; 104 Ind. Cas. 645; A. I. R. (1927) Mad. 841.

on the mercantile basis are arrived at by a comparison of the figures on the credit and debit sides at the opening and closing dates of the year of account in respect of the transactions of the business. Section 13 of the Income-tax Act, 1922, requires that an assessee's income shall be calculated in accordance with the method of accounting regularly employed by him.

4. For the assessment of the year 1923-24 (which had to be computed on the basis of the income of the year 1922-23) the petitioner returned an income of Rs. 16,345 and filed a Profit and Loss Statement certified by an auditor showing his income for the 12 months ending 12th April 1923 as under:—

				Rs.
Headquarters, Sirukudalpatti			..	2,478
Rangoon old account	..	Rs.	17,367	
Rangoon new account (loss)		„	4,578	
			—	.. 12,789
Profit received from Penang partnership				.. 1,078
				—
		Total	..	16,345
				—

Subsequently the auditor filed a revised Profit and Loss Statement for the Rangoon old account in which he showed the income to be Rs. 20,507 instead of Rs. 17,367. He arrived at this figure of Rs. 20,507 after deducting from the gross income receipts as shown in the accounts a sum of Rs. 6,313 which he alleged was "interest adjusted on the loan advanced to the Penang shop but not received". Some time later he put in another claim to deduct a sum of Rs. 5,861 being the interest adjusted to the profit account on the loan advanced to the Penang partnership but not actually received in British India. In calculating the profits of the Rangoon old account the auditor had however deducted as expenses many items of interest payable to foreign creditors although the interest had not been paid.

The Income-tax Officer heard the petitioner's representative on the claim to deduct the two sums of Rs. 6,313 and 5,861 or Rs. 12,174 in all and held that as the loans were advanced in Rangoon the interest accrued and arose to the petitioner in British India and as that interest was taken credit for in the petitioner's Rangoon accounts which were maintained on the mercantile basis, it was liable to be assessed under sections 4 (1) and 10 read with section 13 of the Income-tax Act. He therefore took all credits in the accounts as receipts and allowed all debits in the accounts as expenses and after adding back certain expenses which were inadmissible under the Act assessed the total income of the petitioner at Rs. 39,748 as shown under and levied an income-tax of Rs. 3,105-5-0.

				Rs.
Property	..	..	..	1,587
Business, headquarter	..	..	..	2,629
„ Rangoon old account	..	..	..	38,946
Remittances from Penang	..	..	..	1,078
				—
				44,240
Deduct loss from Rangoon new account	..	..	..	4,492
				—
		Total income	..	39,748
				—

5. The petitioner appealed to the Assistant Commissioner against this assessment and contended *inter alia* that the interest of Rs. 12,174 credited in the Rangoon accounts on the loan to the Penang firm represented "income in the shape of interest due from Penang" and that, as "there has been no payment towards this income" and "Penang is still a debtor to Rangoon", the adjustment of this interest in the Rangoon books could not be construed as the receipt of the income into British India for purposes of assessment. Extract from his appeal petition is filed as Exhibit A. The Assistant Commissioner, however, upheld the assessment on the grounds that the sum advanced by his Rangoon shop to the Penang firm was, as admitted by the petitioner, a loan on which interest accrued, arose and was payable in British India, that as the petitioner took credit in his books for the interest due, the interest should be taken to have been realised according to the method of accounting adopted by him and that, as the interest did not accrue in the foreign country, the question of remittances of foreign profits did not arise. An extract of the Assistant Commissioner's order is filed as Exhibit B.

6. The petitioner then filed an application to the Commissioner under section 66 (2) of the Income-tax Act and contended that the sum advanced by his Rangoon shop to the Penang firm was not a loan made in the regular course of the Rangoon business but a surplus investment made by him in a joint business at Penang in which he was a partner, that the interest on this sum accrued in Penang and that, as it was not actually remitted to British India it could not be taxed here. In support of his position he produced certain letters to show that the amount, though originally advanced by his Rangoon shop, was really an investment by the headquarters in the Penang business the interest on which was payable to the headquarters and not to Rangoon. A copy of the application is filed as Exhibit C. This position was entirely inconsistent with that taken up at the time of the assessment and of the appeal before the Assistant Commissioner when he admitted that the money sent from Rangoon to Penang was a loan in the regular course of business. It was also inconsistent with the entries in the accounts which showed that the amount due by Penang was on current account with Rangoon, that the Rangoon shop took credit for the interest on this amount and that the Penang firm showed payment of interest on the same amount to the Rangoon shop and not to the headquarters, though there was a separate ledger in the Penang accounts for transactions with headquarters. The Commissioner doubted the genuineness of the correspondence between the petitioner and his Rangoon agent in regard to the transfer of the money from the Rangoon to headquarter account, and held that even if the letters were genuine they merely embodied an idea of the petitioner, which the books showed had not been carried out. The balance sheet of the Rangoon shop (a copy of which is filed as Exhibit D) no doubt indicated that the petitioner had sufficient capital of his own to cover the amount alleged to have been transferred to Penang on headquarter account but there was no proof that the money was so transferred. On the other hand all the circumstances indicated that the advance was a 'loan' advanced by Rangoon to Penang as previously admitted by the petitioner. During the hearing of the application the Rangoon and Penang accounts and the Rangoon Vaddi Chittas were produced and examined by the Commissioner's Personal Assistant and by the then Assistant Commissioner, Central Range. They have noted that the Vaddi Chittas were prepared and sent from Rangoon to Penang. Petitioner's vakil now denies this, but the copy of the Penang ledger in the Rangoon accounts supports their statement as the interest is entered "Vatti Chittaiyadi" which implies that Vatti Chittais had been interchanged. I accordingly accept the statements of the then Personal Assistant and Assistant Commissioner as correct.

Further in the affidavit filed by the Commissioner during the hearing of the application under section 66 (3) it was specifically stated that Vaddi Chittas had been issued by Rangoon and accepted by Penang. That allegation was not definitely denied by the petitioner in his second affidavit. On the facts before him, the then Commissioner rejected the new theory put forward by the petitioner and refused to state a case to the High Court (Ex. G.). The facts found during these proceedings are summarised below:

(a) that the petitioner's business was carried on in British India;

(b) that the loans on which the interest of Rs. 12,174 accrued was made by the petitioner from Rangoon and the accounts showed that it arose on the current account of the Rangoon shop with the firm in Penang;

(c) that the interest was adjusted in the Rangoon accounts as a receipt from Penang and the Penang accounts also showed payment of interest on this amount to the petitioner's Rangoon shop although the entries were made on different dates and for slightly different periods:

(d) that the petitioner's Rangoon accounts are kept on the mercantile basis according to which the interest due is treated as receipts irrespective of actual realisation;

(e) that Vatti Chittais were interchanged between the Rangoon and Penang agents and that the entries were made in Rangoon after they had been accepted by Penang;

(f) that in accordance with the mercantile basis the debit entries made on account of interest due by the petitioner to his creditors in foreign places were treated as payments though the interest had not actually been paid and such debits were allowed as an expenditure in computing the profits of his Rangoon shop.

7. An application under section 66 (3) of the Indian Income-tax Act was made to the High Court to direct the Commissioner to state a case on certain questions of law which he alleged arose in his assessment. The application was heard by the Hon'ble Mr. Justice Kumaraswami Sastri. In the course of the proceedings before him he called upon the Assistant Commissioner, Southern Range, to examine petitioner's accounts and record definite findings on the question whether, having regard to the entries in the accounts and the course of business, there was only a book adjustment of the interest or anything amounting to payment of interest by the Penang firm to the petitioner's Rangoon business. The Assistant Commissioner examined the books and recorded the findings, a copy of which is filed as Exhibit E. On these findings of fact the High Court held that no question of law arose and dismissed the application. The order is filed as Exhibit F.

8. The petitioner filed an appeal against this order in O.S.A. No. 89 of 1924. Their Lordships who heard the appeal considered that questions of law were involved and by their order dated 12th January 1926 (received by me on 22nd February 1926) I have been directed to refer the following questions of law with my own opinion thereon for the decision of the High Court:—

“(1) In the circumstances of this case can the interest on the loans or advances made by the assessee to the partnership firm at Penang be said to be income accruing or arising in British India within the meaning of section 4 clause (1) of the Indian Income-tax Act.”

“(2) If the answer to the above question is in the negative and if the income is one accruing or arising without British India to a person resident in

British India is the income one received in British India so as to make it taxable under section 4 read with sections 6, 10 and 13 of the Act?"

9. *Question (1).*—On the findings of fact by the Income-tax authorities summarised at the end of paragraph 6, I am of opinion that it must be held that the interest on the sum of Rs. 67,000 sent to Penang is income accruing or arising in British India. We are not taxing the profits made by the Penang firm through lending out in Penang the capital borrowed from Rangoon. What we are taxing is the interest due to the petitioner's Rangoon shop from his partnership firm at Penang on the loan given by petitioner at Rangoon. I know of no justification for the view that the loans made by a banker in British India must be dealt with separately according as the borrower is in British India or outside British India. Any Bank in British India in computing its taxable profits would certainly make no distinction between loans lent to a merchant in Madras and loans lent to a planter in Travancore.

Question (2).—I am of opinion that the sum of Rs. 12,174 is one received in British India within the meaning of sections 4, 10 and 13 of the Act. In Referred Case No. 2 of 1920 *The Secretary to the Board of Revenue (Income-tax) Madras v. Ar. Rm. Arunachalam Chettiar* ⁽¹⁾ the effect of the words "income accruing arising or received in British India" occurring in section 3 of the Income-tax Act VII of 1918 (which was repealed by the present Act XI of 1922) came up for judicial consideration before a Full Bench of five judges of the Madras High Court. Justice Napier held "If a person entitled to receive money agrees with his debtor to let the money stand in the hands of the debtor either by way of deposit or as a fresh loan of investment, that would in my opinion amount to receipt". Justice Ayling said "I agree with Napier, J., that if a person entitled to receive interest agrees with his debtor to let the money stand in the hands of the debtor either by way of deposit or as a fresh loan or investment that would amount to a receipt". Justice Krishnan remarked "Actual payment of cash by the payer to the payee is of course not necessary to constitute a receipt or realisation. Payment by a bank of interest earned by a fixed deposit to a person's current account in the bank itself would also amount to a receipt by him. Again the case put by the Board of a Nattukottai Chetti not drawing the interest that has accrued to him but leaving it with the payer to be added to the capital and to carry interest itself would also be a case of realisation in the view I am taking". Similar views were expressed by Justice Sadasiva Ayyar. In this case the petitioner as well as his creditor the Penang partnership are both bankers. The petitioner prepared and issued vaddi chittais to his debtor the Penang partnership and on acceptance of the same by his debtor took credit for the interest due in his Rangoon business accounts. The Penang partnership gave credit to the petitioner for the interest on this amount in its own accounts and interest is being calculated on the capital plus the interest credited thereon. In other words the petitioner instead of receiving the interest in British India and retransmitting it to Penang managed to get a corresponding credit for his business in British India by an adjustment in the accounts. Such an adjustment has the same effect as actual receipt.

Further in the Rangoon business there were both interest due from persons resident outside British India but not actually received and interest due to persons outside British India but not actually paid. The petitioner has in his accounts taken credit for interest due to him and debited the accounts on interest payable by him. As stated in paragraph 3 above the petitioner is maintaining

his accounts on the mercantile basis so that, under the explanation contained in section 10 (3) the interest debited to the accounts though not actually paid has been allowed as an expenditure. I am of opinion that the interest credited to the accounts in accordance with the method of accountancy employed by him must in the same way be taken to have been received by him within the meaning of section 4 read with sections 10 and 13 of the Income-tax Act. Any other conclusion will make it impossible to assess foreign traders on the mercantile basis. If in the present case for example the result of adopting the mercantile system of accountancy is to be that amounts debited but not paid must be treated as outgoings while amounts credited but not received in cash and standing on primarily the same footing as the debits cannot be treated as incomings, the assessing officer could hardly avoid the conclusion that in the circumstances the assessee's income, profits and gains could not be deduced from accounts maintained on the mercantile system of accountancy, and he would have to exercise his discretion under the proviso to section 13 of the Act and compute the income on some other basis.

K. S. Krishnaswami Aiyangar, for assessees.

M. Patanjali Sastri, for the Crown

JUDGMENT*

BEASLEY, J.—Two questions are referred to us for decision : (1) in the circumstances of this case can the interest on the loans or advances made by the assessee to the partnership firm at Penang be said to be income accruing or arising in British India within the meaning of Section 4 clause 1 of the Indian Income-tax Act and (2) If the answer to the above question is in the negative and if the income is one accruing or arising without British India to a person resident in British India, is the income one received in British India so as to make it taxable under section 4 read with sections 6, 10 and 13 of the Act.

The assessee has a business of his own in Rangoon carried on by an agent and is interested with another or others in a money-lending business in Penang in which he is the chief partner. From the Rangoon business under his orders a sum of Rs. 78,768-7-3 was transferred in cash to the Penang business. In the books of the Rangoon business a sum of Rs. 12,174 is entered as interest on that money from Penang and the assessee has in respect of the interest been assessed under section 4 sub-section (1) of the Indian Income-tax Act as income accruing, arising or received in British India. The assessee contends that interest so credited in the Rangoon books is interest earned outside British India, that is, foreign income and that the crediting of interest in the Rangoon books is merely a book entry and that there has in fact been no actual receipt of the money in Rangoon and that therefore it is not income arising under section 4 sub-section (1) of the Indian Income-tax Act and is not income arising under section 4, sub-section (2) of the same Act because it has never been received in British India. The short answer to that contention in our view is that this interest is not a profit or gain arising without British India. The Income-tax Commissioner does not seek to tax anything that the Rs. 78,768 may have earned in Penang. What he has done is to assess the profits of the Rangoon business under section 10 of the Indian Income-tax Act computed in the manner directed by section 13 of the same Act. Section 13 was no doubt introduced to obviate many difficulties. It is a great advantage to both traders and Income-tax

*The Judgment of the Court was delivered by Beasley, J.

Officers. It is open to a trader to adopt either the mercantile basis of accounting or the cash basis. He is not forced to adopt one in preference to the other but he cannot adopt both. The assessee in common with most of the business firms in India has chosen to adopt the mercantile basis of accountancy and not the cash basis. He cannot for the purpose of more conveniently carrying on his own business adopt the mercantile basis and then for the purpose of income-tax assessment adopt the cash basis. What is done in accordance with the mercantile basis is that the debit entries made on account of interest due by the assessee to his creditors in foreign places are treated as payments of interest though interest has not actually been paid and such debits are allowed as an expenditure in computing the profits of the assessee's business in British India. Similarly credit entries made on account of interest due by creditors in foreign places to the assessee are treated as payments of interest though that interest has not actually been paid and admittedly in this case this basis has been adopted and no question as to whether or not interest has actually been received or has actually been paid can under this basis possibly arise. What the assessee seeks to do is whilst adopting the mercantile basis in regard to all the other entries of interest in his accounts to adopt an entirely different basis, i.e., cash basis for the purpose of this one entry and to argue that interest has never been received in British India although it is entered as a profit in exactly the same way as all the other credits of interest are, all the other entries being treated on the mercantile basis as money actually received. The assessee has chosen to adopt the mercantile basis. His own accounts are dead against him and in our view preclude him from arguing here, as he does, that this interest is income arising outside British India, and not received in British India, because in law the transfer called in the assessee's books an advance to the Penang firm cannot be a loan. In our view once an assessee has adopted the mercantile basis of accountancy it is upon that basis and upon that basis alone that he is to be assessed. It would be an impossible position if an assessee after having adopted the mercantile basis were to call upon the Income-tax Officers to make a long and difficult inquiry with regard to the various items entered as profits in the accounts of the assessee in order to prove that those sums were actually received in British India. This interest is treated like all the other interest in the assessee's books as a receipt of profit. The money transferred is treated as an advance. The interest is treated as interest on that advance in just the same way as all other interest is treated as interest on loans made to others. Not only that, interest in *Life Assurance Society v. Bishop*,⁽¹⁾ was referred to by the assessee as a case in support of his contention. But that case has no application to this case as that was a case of a foreign income, whereas in this case on the facts, that is to say, the mercantile basis of accountancy voluntarily adopted by the assessee, the interest is income which properly arises under section 4, sub-section (1) of the Indian Income-tax Act. Our answer to the first question referred to us is in the affirmative and in view of this answer the second question does not arise. The assessee will pay the costs of this reference, Rs. 250 to the Commissioner of Income-tax.

(1) 4 Tax Cas. 464; (1902) A. C. 287.

[191] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and Mr. Justice Srinivasa Aiyangar.

[5th May, 1927.]

Messrs. Sheik Abdul Kadir Maracayar & Co. . . . Assessee.*

v.

The Commissioner of Income-tax, Madras . . . Referring Officer.

Income-tax Act (XI of 1922), Secs. 28, 33 and 34—Assessee alleged to have escaped assessment on real income—Reassessment proceedings taken by the Income-tax Officer—Notice not served within the period limited under S. 34—Initiation of fresh reassessment proceedings by the Commissioner after expiry of notice period—Powers of the Commissioner under sec. 33, scope and limits of—Service of notice under Sec. 34, if condition precedent to reassessment—Limits of the power to impose penalty under Sec. 28.

Under section 34 of the Income-tax Act, it is the Income-tax Officer alone that can initiate reassessment proceedings and the Commissioner has no right of initiating or independently starting reassessment proceedings. The condition precedent for reassessment is service of notice indicated under S. 34 and consequently where such service of notice has not been effected, the Commissioner in exercise of the powers under Sec. 33 has no right to initiate further or fresh proceedings for reassessment. For the purpose of initiating reassessment proceedings, S. 33 of the Act is subject to the provisions of S. 34.

The power to levy penalty under S. 28 of the Act cannot be exercised in the course of the re-assessment proceedings, if such proceedings had not been properly commenced by the issue of the notice under S. 34 of the Act.

The assessee, hides and skins merchants, were assessed for the year 1923-24 under S. 23 (3) of the Act on an income of Rs. 12,058. In the course of the assessment proceedings for the succeeding year 1924-25, the Income-tax Officer found that the assessee had escaped assessment in 1923-24 on an income of Rs. 18,943 from certain sources which were not then disclosed by them. Thereupon in March 1925, the Income-tax Officer proceeded to take action under S. 34 by issuing a notice calling upon the assessee for a fresh return of their income for 1922-23 and served this notice on a clerk of the assessee's firm. On the assessee not responding thereto, a re-assessment was made under S. 23 (4) and 34 of the Act and a demand notice of this re-assessment was served. The assessee then unsuccessfully applied to the Income-tax Officer under S. 27 of the Act to set aside the re-assessment on the ground of want of proper service of notice under S. 34. On appeal, the Assistant Commissioner set aside the order of re-assessment on the ground that there had been no valid service of notice for re-assessment. After the expiry of the period for notice laid down in S. 34, the Commissioner of Income-tax purporting to start proceedings under S. 33 of the Act restored the reassessment and further levied a penalty under S. 28 of the Act.

Held, that as the Commissioner did not purport to revise the finding of the Assistant Commissioner as regards the legality of the service of the notice, there was no proper service of notice under S. 34 to validate the reassessment proceedings taken by the Income-tax Officer and the initiation of independent reassessment and penalty proceedings by the Commissioner purporting to act under S. 33 was illegal.

Case [Referred Case No. 20 of 1926] stated under section 66 (3) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, in pursuance of the order of the High Court, dated 11th November, 1925, and reported in 2 I. T. C. 155.

CASE.

In pursuance of the order quoted above, I have the honour to refer the following case for the decision of the High Court under section 66 (1) of the Income-tax Act, 1922.

2. The facts of the case are as follows :—For the assessment of the year 1923-24 based on the accounts of the period, 1st April 1922 to 31st March

*(1928) 54 M L J 298; 27 L W 294; A I R (1928) Mad. 257.

1923, Messrs. Sheik Abdul Kadir Marakkayar & Company, were required by the Income-tax Officer (Revenue Divisional Officer) Palghat, to make a return of their income under section 22 (2) of the Income-tax Act, 1922. The assessee returned their income at Rs. 4,860 from business. In response to a notice under section 23 (2) of the Act they produced their accounts through their clerk, Mr. Erachan Nair, who usually represented them in income-tax proceedings. The accounts were examined by an Accountant of the Divisional Office, who stated in his notes that the assessee were trading in buffalo hides, bull hides, and goat hides and that their gross income from business according to the accounts amounted to Rs. 17,705. The assessee's clerk who was examined on oath by the Income-tax Officer accepted this figure and claimed to deduct from it expenditure amounting to Rs. 7,667. The Income-tax Officer disallowed certain inadmissible expenses such as food expenses, income-tax and charity and fixed the taxable income at Rs. 12,058. He accordingly assessed the petitioners on 18th December 1923, under section 23 (3) of the Act and levied a tax of Rs. 565-4-0. In the course of the assessment for the next year 1924-25 the Income-tax Officer who himself examined the accounts observed that in addition to the sources of income disclosed on the assessment of the year 1923-24, the petitioners had other sources, such as trade in salted buffalo hides, salted sheep skins, grease, horns and ground rent and also derived income from commission. He found that the petitioners had derived an income of Rs. 18,943 from these sources as particularised below during the year of account 1922-23 and that this income had escaped assessment in the year 1923-24.

Profit on salted buffalo hides.	Rs.	15,479	14	10
" " sheep skins	"	338	3	9
" grease	"	186	1	10
" horns	"	389	12	3
Commission ..	"	2,161	9	9
Charity ..	"	159	15	8
Ground-rent ..	"	227	12	0
Total ..	Rs.	18,943	0	0

The petitioners had been assessed on Rs. 12,058 while their real income was Rs. 18,943 more or Rs. 31,001. The Income-tax Officer therefore decided to take action under section 34 of the Income-tax Act and issued a notice to the assessee calling on them to make a fresh return of their income during the year of account 1922-23. This notice was served on Erachan Nair who was still representing the firm in the assessment of 1924-25. The assessee did not respond to this notice. The Income-tax Officer made the assessment under sections 23 (4) and 34 of the Income-tax Act on an income of Rs. 31,001 and levied additional tax amounting to Rs. 1,856-11-0 in respect of the assessment year 1923-24. The notice of demand was served on the assessee on 13th March 1925. They then filed a petition before the Income-tax Officer under section 27 of the Act and alleged that the notice required to be given under section 34 of the Income-tax Act had not been served on them. When it was pointed out to them that a notice was issued and was served on their representative, Erachan Nair, they maintained that their representative did not bring it to their notice and that as Erachan Nair was not an authorised agent the notice served on him did not amount to a valid service. Erachan Nair was then examined by the Income-tax Officer. He

admitted having signed an acknowledgment but explained that he was under the impression that the signature obtained from him was in token of his having prepared statements from accounts for the assessment of the year 1924-25. The signature obtained from the representative was in a printed acknowledgment slip which recited "received income-tax notice form 10 and 11 (section 34)". The representative knew English and his explanation was obviously false. The clerk of the Income-tax Officer who handed over the notice under section 34 was examined and he deposed that he personally gave the notice to Erachan Nair. On the evidence recorded the Income-tax Officer found that the notice was served on Erachan Nair, that as he was the person who was sent to represent the assesseees in their Income-tax proceedings and posed as their agent, service on him was valid service and that the petitioners were not prevented by sufficient cause from making the return. He accordingly dismissed the application under section 27. A copy of his order is appended Exhibit A. Against this order the petitioners filed an appeal to the Assistant Commissioner under section 30 of the Income-tax Act and contended that the service of the notice on Erachan Nair was not valid service as he was not their authorised agent. The Assistant Commissioner held that though Erachan Nair was sent by the assesseees to represent them in their Income-tax proceedings and the assesseees had used him as their agent, he was not formally authorised by them to act on their behalf and that the notice served on him was not valid. He therefore cancelled the assessment made by the Income-tax Officer. A copy of his order is appended Exhibit B. My predecessor (Mr. Strathie) who perused the records of this case was of opinion that by dishonestly concealing their income in their return and suppressing the evidence of the accounts when called for, the petitioners had evaded a large amount of tax in the first assessment and that the supplemental assessment started under section 34 of the Act had been cancelled by the Assistant Commissioner on a technical point. He therefore proposed to restore the assessment made by the Income-tax Officer in the exercise of the powers vested in him under section 33 of the Income-tax Act. He issued a notice to the petitioners on 31st July 1925, and called on them to show cause why he should not enhance the original assessment and also levy a penalty under section 28 of the Income-tax Act. They responded to this notice through a vakil and contended that section 33 did not enable the Commissioner to take action and enhance the assessment after the expiry of one year from the end of the year for which the assessment was made. They also asked the Commissioner to refer this point for the decision of the High Court. They did not produce the accounts of the year 1922-23 on the plea that they had been destroyed by fire. Nor did they examine Erachan Nair, to prove their case that he did not communicate to them the notice issued under sections 22 (2) and 34 of the Income-tax Act. Mr. Strathie was of opinion that section 33 did not impose any time-limit on his powers to proceed under that section and that there was no need to refer any question of law to the High Court. He therefore enhanced the assessable income of the petitioners from Rs. 12,058 to Rs. 31,001, i.e., he restored the assessment made by the Income-tax Officer under section 34 of the Act. At the same time he levied a penalty of Rs. 1,000 under section 28 of the Act as the assesseees had concealed particulars of their income in their original return. Copies of his orders under sections 33 and 28 of the Income-tax Act, are appended Exhibits C and D.

3. On the petitioners' application under section 45 of the Specific Relief Act the High Court has directed me to refer the following points for its decision:—

- (a) Whether a Commissioner is empowered by way of review or revision to impose the assessment and penalty levied by him by his order, dated 8th September 1925, against the firm of Sheik Abdul Khadir Marakkayar & Company.
- (b) Whether in the circumstances of this case the powers of review under section 33 of the Income-tax Act, 1922, could be exercised by the Commissioner with a view to re-open and enhance an assessment made under the old Income-tax Act of 1918.
- (c) Whether sections 33 and 28 of the Income-tax Act, 1922, are not controlled by the provisions of section 34 of the same Act.
- (d) Whether the Commissioner in exercise of the powers under S. 33 can re-open and enhance an assessment more than one year old and levy penalty under section 28 in respect of such an assessment.

I may be allowed to point out that the second question does not arise in this case as the assessment originally made by the Income-tax Officer (Revenue Divisional Officer) Palghat was under the Income-tax Act, 1922, and not under the Act of 1918, as stated. The other questions really reduce themselves to the single question whether the words "subject to the provisions of 'this Act'" limit the powers of the Commissioner under section 33 to cases not older than the year previous to that in which the revision is undertaken.

4. Before giving my opinion on the above question I would request their Lordships to view the case from the following aspect. The notice required under section 34 was issued within the one year's limit. An assessment was made and there was a petition under section 27. An appeal was preferred to the Assistant Commissioner against the order dismissing the petition under section 27. In the course of the hearing of the appeal it was held that there was a technical irregularity in the service of the notice. That being so, it is, I submit, possible to regard the Commissioner's proceedings as a continuation of those of the Income-tax Officer and to hold that action under section 34 was taken within the period prescribed therein and that the Commissioner was merely rectifying a technical irregularity. If this view is correct the above questions of law does not arise at all.

5. On the question raised I am of opinion that section 33 does not limit the period within which the Commissioner can take action. The Legislature while it has laid down a limit of time within which subordinate officers may take action under sections 34 and 35 has specifically refrained from prescribing any such limit in the case of the Commissioner. The words "subject to the provisions of this Act" seem merely to mean that the Commissioner in revising a case is bound by the provisions of the Act regarding the computation of income, admissible deductions, procedure, etc. I do not consider that these words can bear any wider interpretation. It would have been very easy for the Legislature to prescribe a limit of time had it wished to do so. I submit that the Act should be literally interpreted and that in the absence of a time limit imposed *totidem verbis*, the Court should not be swayed by any suggestion that the exercise of powers unlimited in point of time is contrary to natural justice. It appears to me moreover that there is nothing unreasonable in these wide powers being given to the Commissioner. In India the power of review given to the lower officers is rigidly restricted to one year, whereas in England any officer of the Revenue staff may revise assessments within six years. The power of revision being restricted in India to the Commissioner it is but natural that that power should be unlimited with regard to time especially as in India, there is far more scope for incorrect assessments than

there is in England. It has to be remembered that the Commissioner is a busy officer and it is physically impossible for him to revise more than a very limited number of cases. Action was only taken in the present case because the proceedings before the Assistant Commissioner had just terminated and because the Commissioner was of opinion that the assessee had escaped proper assessment. The action of the Commissioner is subject to the control of the Central Board of Revenue. There is therefore no danger whatever of the Commissioner's powers being abused. On the other hand it appears to me eminently reasonable that the Commissioner who is the supreme executive authority referred to in the Act should have unlimited powers to rectify at his discretion mistakes which come to his notice even though more than a year may have elapsed since the year to which the assessments relate. The imposition of a time-limit would of course operate both ways, and might compel a Commissioner to withhold relief where justice required that it should be given. As the grounds for holding that the Legislature have by implication limited the Commissioner's powers to one year are very slight, it may be permissible to assume that those responsible for the passing of the Act undoubtedly did not intend that any limit should be imposed. With reference to the wording of the first question put to me I wish to make it clear that I do not claim power for the Commissioner to initiate proceedings otherwise than under section 34 for the assessment of income in regard to which no previous proceedings have been taken by his subordinates. It is not usual for a Commissioner to initiate assessment proceedings at all nor has he as Commissioner the power to do so and a Commissioner who exercised the powers of an Income-tax Officer by starting assessment proceedings or who directed any officer subordinate to him to start any such proceedings absolutely *de novo* would no doubt be controlled by the time-limit prescribed in section 34. But in this case the action taken by the Commissioner was not taken in exercise of the powers of an Income-tax Officer but in exercise of the powers explicitly conferred on the Commissioner by section 33. There was no question of starting assessment proceedings *de novo*. The Commissioner's order was passed by way of revision or review of the proceedings previously taken by the Income-tax Officer and the Assistant Commissioner. It was not an assessment proceeding and cannot properly be described as such merely because it re-instated the assessment imposed in due time by the Income-tax Officer under section 34. In my opinion it does not fall under section 34, nor has section 34 any application to it.

Regarding the legality of the penalty imposed under section 28, I am of opinion that this depends entirely on whether the Commissioner had power to review the case under section 33. The penalty was imposed in the course of the proceedings under section 33 and was lawful if those proceedings were lawful.

Vere Mocket for Basheer Ahmad Sayeed, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.*

SRINIVASA AIYANGAR, J.—By order of this court, dated the 9th day of November 1925, the Commissioner of Income-tax has referred for the decision of this court the following questions :—

- (a) Whether a Commissioner is empowered by way of review or revision to impose the assessment and penalty levied by him by his order, dated 8th September, 1925, against the firm of Shiek Abdul Khadar Maracayar and Company.

*The Judgment of the Court was delivered by Srinivasa Aiyangar, J.

- (b) Whether in the circumstances of this case the powers of review under section 33 of the Income-tax Act, 1922, could be exercised by the Commissioner with a view to re-open and enhance an assessment made under the old Income-tax Act of 1918.
- (c) Whether sections 33 and 28 of the Income-tax Act, 1922, are not controlled by the provisions of section 34 of the same Act.
- (d) Whether the Commissioner in exercise of the powers under S. 33 can re-open and enhance an assessment more than one year old and levy penalty under section 28 in respect of such an assessment.

All the facts necessary for the reference have been set out in the letter of reference to this Court and for purposes of the answer the facts may be briefly set out.

A firm called Messrs. Sheik Abdul Kadir Maracayar & Co., who were liable to pay income-tax for the assessment year 1923-24 based on the accounts for the year 1922-23 escaped income-tax on a portion of their income by reason of certain sources of their income being withheld. Under the provisions of section 34 of the Income-tax Act XI of 1922, the Income-tax Officer was entitled to proceed before the end of year 1924-25 to re-assess such income. It is admitted that action was taken by the Income-tax Officer under section 34 of the Act and notice also issued before the 31st March 1925. As the assessee did not make any response to the notice, the Income-tax Officer proceeded to re-assess and as the result thereof an additional tax amounting to Rs. 1,856-11-0 was imposed on the assessee. The notice of demand was served on them on the 13th of March, 1925. The assessee thereupon filed before the Income-tax Officer a petition under section 27 of the Act on the ground that the original notice of re-assessment had not been properly served on them, but the Income-tax Officer dismissed that petition holding that there was proper service.

The petitioner thereupon filed an appeal to the Assistant Commissioner and he set aside the order of re-assessment holding that there has been no valid service of the notice of re-assessment. What is required to be done under S. 34 of the Act to entitle the Income-tax Officer to re-start proceedings and re-assess the parties is the service of a notice of such assessment according to the prescribed form.

Then, after the order of the Assistant Commissioner in appeal setting aside the order of re-assessment made by the Income-tax Officer, there was an end of all the proceedings lawfully started for re-assessment. It was thereupon that the Commissioner of Income-tax purported to take proceedings under section 33 of the Act. That section enables the Commissioner of his own motion to call for the records of any proceedings under the Act and after any enquiry to pass, subject to the provisions of the Act, such orders as he thinks fit. Though this is called "the power of review" in the marginal note to the section, it is clear that the real jurisdiction given under this section is not by way of review but by way of what is generally known as revision or superintendence. Proceeding under that section, in effect what the Commissioner said and did was really this: "The Income-tax Officer started proceedings under section 34 and re-assessed the parties, but the order of re-assessment was set aside by the Assistant Commissioner on appeal on the ground that there had been no proper service of notice. I will assume that there was no proper service of notice, but as the Income-tax Officer really commenced proceedings, I shall under section 33, take up that proceeding at the stage at which it was left and proceed to re-assess the parties by virtue of the powers vested in me of revision under section 33 of the Act".

On these facts, the first question (question (a),) which is the general question, has to be answered only on the result of the answers to the other questions.

Question (b) as pointed out by the Commissioner does not arise, because it appears to have been raised on a misapprehension that the proceedings sought to be reviewed were proceedings that had been taken not under the present Act, namely, the Act of 1922, but under the old Act of 1918. But it has been pointed out that the proceedings were taken only under the new Act. The question therefore does not arise or require to be answered.

Then as regards question (c) which is as follows:—"Whether sections 33 and 28 of the Income-tax Act, 1922 are not controlled by the provisions of section 34 of the same Act." Taking section 33 first, generally speaking, no doubt every section in an enactment is in a sense subject to every other section in the enactment, or in other words, all the sections have to be read together. But it will not be correct to say that section 33 of the Act is in any other sense controlled by the provisions of section 34 of the same Act. If there was a proceeding under section 34 of the Act, that would undoubtedly be a proceeding which is capable of being revised under section 33 by the Commissioner. It will therefore not be quite correct to say that section 33 is controlled by the provisions of section 34. But section 33 also speaks of the Commissioner making such orders as he thinks fit only subject to the provisions of the Act. That expression clearly indicates that the power of the Commissioner to pass such orders as he thinks fit on revision is subject to the provisions of the Act. In other words, though the section says that the Commissioner may pass such orders as he thinks fit, the section indicates that the orders to be passed by him must be in accordance with the provisions of the Act and should not contravene such provisions. What then is the nature and scope of the power of the Commissioner to make any such re-assessment as he has done in this case? The power to re-assess is given expressly only by section 34 and that section prescribes the condition precedent to any such valid re-assessment, the condition precedent being service within one year of a proper notice on the assessee giving notice of the intention on the part of the Income-tax Officer to re-assess. The power of re-assessment is given in express terms only to the Income-tax Officer and not to any other Officer, the Assistant Commissioner or the Commissioner. If it was intended by the Legislature that the Commissioner or the Assistant Commissioner should also have similar powers, there is no reason why all of them should not have been mentioned as in the case of section 28. When it is a question of re-opening an assessment already completed and when the statute prescribes the particular mode in which alone re-assessment can be effected, it is clear that the condition should be rigidly observed before the power is purported to be exercised.

Though in the letter of reference it is admitted that the Commissioner of Income-tax would not generally initiate either assessment or re-assessment proceedings, still it is claimed that as a matter of law he has the right to do so.

Having regard therefore to the terms of section 34, it is impossible to recognise the right of the Commissioner to initiate any such proceedings. It may well be that no such right was expressly given to the Commissioner or even to the Assistant Commissioner because they can always by an official direction require the Income-tax Officer to take such proceedings; and further under section 33 the Commissioner has the power to revise any proceedings by the Income-tax Officer.

Thus from the scheme of the Act it would be clear that it is the Income-tax Officer alone that can initiate re-assessment proceedings. But if the Income-tax Officer should make a mistake and after having started re-assessment proceedings fail to re-assess the parties, the proceedings of the Income-tax Officer would undoubtedly be open to revision by the Commissioner under section 33 and he may thereupon pass any order as he thinks fit. But it must be borne in mind that the condition precedent to this exercise of the power of re-assessment is the proper service of notice indicated in section 34. We may even go further and indicate that in this very case although the Assistant Commissioner set aside the order of re-assessment made by the Income-tax Officer on the view that the Assistant Commissioner took of the validity of the service of the notice, it was still open to the Commissioner under section 33 to revise that order of the Assistant Commissioner, set it aside and restore the order of the Income-tax Officer. But this was not what was done or even purported to be done.

The Commissioner for purposes of his order of re-assessment assumed that the order of the Assistant Commissioner regarding the validity of the service of the first notice was right and proper, and that finding has not been set aside.

The question then resolves itself into whether in the absence of service of notice within the year as indicated in section 34 it is open to the Commissioner to serve another notice after the lapse of the year and seek to re-assess the parties. It seems to me, having regard to the scheme of the Act, that the condition precedent for re-assessment being the service of the notice as indicated in section 34 and such service of notice not having been effected according to the findings, the Commissioner had no right to initiate further or fresh proceedings for re-assessment. The power of revision given in section 33 is a power merely of revision and such powers cannot be regarded as being larger than the powers of a Court of appeal. It therefore follows that so long as the Commissioner did not in revision seek to set aside the finding of the order of the Assistant Commissioner with reference to the service of notice, it follows we must proceed on the footing that there had been no valid service of notice within the time under section 34 of the Act and that therefore the condition precedent for re-assessment has not been satisfied or complied with.

We find it absolutely impossible to agree to the extravagant claim actually put forward in the letter of reference that without any limitation as to time the Commissioner under the powers of section 33 might, at any time in respect of any matter, pass any order he thinks fit, and that the court has no right to interfere with the same. Obviously, even though no limitation of time is prescribed for interference by way of revision under section 33, the court would almost always incline in favour of taking the view that such exercise of power should be within a reasonable time of the proceedings sought to be revised, reasonable time being computed by the court having regard to all the other provisions of the Act, to the facts of the particular case and the special features, if any, in it.

Under the revisional powers, it is clear that the authority revising can only do that which the original authority could have done or ought to have done. If *ex concessis* there had been no valid service of notice of re-assessment within the year prescribed by section 34 and therefore the Income-tax Officer had no power to re-assess after the expiry of one year, it seems impossible to agree to the contention that under section 33 exercising the powers of revision the Commissioner could do what the Income-tax Officer could not possibly have done. The very terms of section 33 of the Act would seem clearly to indicate that the order passed by the Commissioner is only by way of revision and limited to what could or ought to have been done by the authority whose proceed-

ing is revised. The proceeding sought to be revised by the Commissioner on which the order of re-assessment has been made by him, could be regarded at the stage at which it was taken up by the Commissioner, only as a resolution by him to proceed under section 34 and a mere resolution by him without the service of the notice would not be effective or sufficient to give him the power of re-assessment. We are therefore of the opinion that for purposes of initiating proceedings of re-assessment, section 33 of the Act is subject to the provisions of section 34 of the Act and that the Commissioner has no right of initiating or independently starting re-assessment proceedings. This answer however as indicated already does not deny to the Commissioner, if he had chosen or thought fit to exercise it, the power to revise and set aside the order of the Assistant Commissioner and his findings with regard to the service of the notice.

Then with regard to section 28 and the question whether that section also is controlled by the provisions of section 34 it must be, to begin with, observed that the power to levy penalty under section 28 is said to be, if in the course of any proceedings under this Act the Officer is satisfied that an assessee has concealed the particulars of income, etc., There can be no doubt whatever that if the Commissioner had the power of re-assessing or initiating or starting re-assessment proceedings, that would have been a proper proceeding under the Act and if in the course thereof it was clear to him that the party was guilty of the concealment of income referred to in section 28 he might have levied a penalty.

If there had been a proper order with regard to re-assessment which was being revised by the Commissioner, there might be said to be a proceeding in the course of which it was open to him to discover the concealment and levy the penalty. In the present case the Commissioner was not really exercising the powers of revision but was purporting to initiate and start independent proceedings. If he had no right to initiate or start independent proceedings it follows that anything done by the Commissioner with reference to it cannot be regarded as a proceeding under the Act. If there is no proceeding under the Act, there is no room for anything being discovered in the course of such proceeding. But the question propounded is whether section 28 of the Act is controlled by the provisions of section 34 of the Act and we do not see how it can be said that section 28 is controlled by section 34. But if what was intended by the question should be, whether in respect of re-assessment proceedings, such proceedings should properly have originated by service of notice under S. 34 of the Act before any action can be taken under section 28, it seems to us that re-assessment proceedings under section 34 should have been started before the power to levy penalty under section 28 is exercised. In the present case the Commissioner has undoubtedly levied penalty only purporting to exercise powers of re-assessment but if he had no power of re-assessment it follows that there could also be no power to levy penalty.

Question (d) so far as the present case is concerned, has also been answered in the course of the answer to (c). But the language of this question leaves also much to be desired. If by the expression "assessment more than an year old" is meant re-assessment proceedings under section 34 after the end of the year following the year of assessment, then proceedings by way of re-assessment under section 34 are not clearly open to the Commissioner. But so far as any assessment made by the Subordinate Officer is concerned, there is nothing in section 33 which prevents the Commissioner from enhancing the assessment made on the materials available.

As regards the power to levy a penalty referred to in this question, it also follows that such a power cannot be exercised, as in re-assessment proceedings, if proceedings by way of re-assessment have not been properly commenced. But if on the materials with reference to any original assessment itself it should on revision appear to the Commissioner that there has been any concealment within the meaning of section 28, then section 33 would undoubtedly empower him to levy penalty.

Finally passing on to question (a) it follows from the answers already given to the other questions that what the Commissioner has purported to do was not to revise the order of the Assistant Commissioner and set aside the finding and order with regard to the service of notice and that therefore as there was no proper service of the notice under section 34 of the Act no re-assessment proceedings could have been taken by the Income-tax Officer and that the Commissioner of Income-tax has no right to initiate or start such independent proceedings himself. It also follows that the penalty levied by him which would have been proper if he had the power of initiating or starting independent proceedings, was also wrong.

The assesseees will have their costs of this reference Rs. 300 (Rupees Three Hundred), inclusive of the costs of the original application to direct the reference.

[192] IN THE HIGH COURT OF JUDICATURE AT MADRAS

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and Mr. Justice Srinivasa Aiyangar.

[5th May, 1927.]

O. L. K. K. N. Kannappa Chettiar and others .. Assessee.

v.
The Commissioner of Income-tax, Madras .. Referring Officer.

Income-tax Act (XI of 1922), Sec. 3—Hindu Undivided Family, assessment of—Four brothers constituting a Hindu family—Individual sworn declarations by the brothers of a division in status—Divided status not accepted by the Income-tax authorities—Division in status, if and when effected.

Where the assesseees, four brothers constituting a Hindu family, filed separate sworn statements before the Income-tax Officer that they had become divided in status *inter se* 10 years ago, but the Income-tax authorities treating the said declarations as false refused to accept the partition and made an assessment as a Hindu Undivided Family,

Held, that at any rate on the date when the statements were made, the brothers had become divided in status by reason of their declarations therein to that effect, though with reference to any allegation of divided status on an earlier point of time, it was open to the Income-tax authorities to find on the facts that no such thing has been proved.

Case [Referred Case No. 4 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the decision of the High Court.

CASE.

I have the honour to refer under section 66 (2) of the Income-tax Act, 1922, the following question of law for the decision of the Hon'ble the Judges of the High Court:—

"Is it legal in the circumstances of this case to hold that the Hindu Mitakshara family consisting of the four brothers, Kannappa Chettiar, Subramanian Chettiar, Chidambaram Chettiar and Ramanathan Chettiar is undivided."

2. The essential facts of the case are as follows:—With their return of income for 1924-25 the petitioners who had till then been treated as members of a Hindu Undivided Family, submitted an application for the registration of their firm under Rule 2 of the Income-tax Rules and enclosed a partnership deed purporting to have been drawn up on 25th March 1924. A copy of this partnership deed is appended—Exhibit A. The Income-tax Officer who finally dealt with the assessment did not believe that the petitioners had ceased to constitute a Hindu family and he therefore proposed to levy super-tax on them. Under the Act super-tax is leviable on the income of a Hindu Undivided Family if it exceeds Rs. 75,000, while no super-tax is leviable on a registered firm. Exhibit B is a copy of the notice issued by the Income-tax Officer to the assessee. Exhibit C is their reply. The Income-tax Officer did not accept this representation and called upon the assessee to appear before him and substantiate the various allegations made in the petition. The petitioners and their Vakil appeared accordingly on 3rd June 1925 and filed affidavits (Exhibit D) while one of the members of the family gave a statement, a translation of which is Exhibit E. After considering the evidence produced by the assessee and the other evidence available to him, the Income-tax Officer passed an order (Exhibit F).

3. On the materials before the Income-tax Officer some of which are mentioned in his order (Exhibit F) I consider that there are ample grounds for holding that the petitioner's affidavits are false, that the partnership deed is merely a fabrication for income-tax purposes and that the firm now being assessed is really a Hindu Undivided Family. On the one hand in support of the alleged partition we have the declaration of the four members of the family that they are divided and that they have been divided for some ten years. On the other hand, we have the following facts:—

- (a) that, in spite of the present allegation that they became divided some ten years ago, the petitioners have in every income-tax proceeding up till the present, set themselves up as an Undivided Family, for instance (1) in a petition accompanying his return for 1922-23 O. L. K. K. N. Kannappa Chettiar used these words "the assessee and his three undivided brothers". Again (2) in their final assessment for 1923-24 their total income was found to be Rs. 59,927 which would have rendered them liable to super-tax if the Income-tax Officer had not acted on the previous statement that they were undivided.
- (b) that in O. S. No. 93 of 1923 on the file of the District Munsiff, Sivaganga, Kannappa Chettiar put in a plaint in which he stated that as he had undivided brothers, the plaint was put in by him on behalf of all of them and as manager of the joint family. I find it quite impossible to reconcile this statement with the present allegation that partition took place about ten years ago.
- (c) that there is no indication whatever in the accounts of the businesses or in any other account that the petitioners own any capital individually, or that they have acquired any assets individually, or that they maintained any separate accounts. In the accounts the capital of the various businesses stands in the name of the family. It is the joint family which financed these businesses originally and there is nothing to show that the profits up to the date of alleged partition were divided between the members.

(d) The partnership deeds produced for Income-tax purposes at Rangoon, and at Sivaganga are self-contradictory and are inconsistent with the position now put forward by petitioners.

4. These facts seem to me to make it clear that there is no division among the four brothers. It might be possible for me to hold that the question whether there has or has not been a division is a question of fact, but as it is constantly argued before me that a declaration in an affidavit or other document that a family is divided should be accepted as conclusive evidence of partition under the Hindu Law even though the attending circumstances indicate that the declaration is not genuine, I refer the question for an authoritative pronouncement by the High Court. The facts of the present case seem to me to make it clear that the declarations in the affidavits of the 3rd and 7th June, 1925, were false and I am of opinion that the family should be held to be undivided.

Exhibit A.

This indenture made this 25th day of March 1924 between Kannappa Chettiar, son of Kailasam Chettiar, Hindu, Saivite, Nattukottai Chetty Caste, money-lender, aged about 47, and residing in the village of Sakkandi, Sivaganga Taluk, Ramnad district on the first part, Subramaniam Chettiar son of the said Kailasam Chettiar of the said caste, sect and calling and aged about 44 residing also in the said village of Sakkandi on the second part, Chithambaram Chettiar, son of the said Kailasam Chettiar of the said caste, sect and calling and aged about 37 residing in the said same village on the third part, Ramanathan Chettiar son of the said Kailasam Chettiar of the said caste, sect and calling and aged about 30 and residing also in the said same village of Sakkandi on the fourth part.

Whereas, the parties to this indenture have for a long time past been carrying on money-lending business in partnership in Madura, Rangoon and Wakema in British India and in Colombo in the Ceylon Island under the name and firm of Una, Lana, Kana, Kana, Nana (O. L. K. K. N.) and have been appropriating the profits thereof in equal proportions and whereas for diverse purposes it has become necessary and expedient that the terms and conditions under which the said partnership has been and is being carried on should be set forth in writing in the form of a written instrument.

Now this indenture witnesseth.

1. This partnership shall be carried on as hitherto under the name and firm of O. L. K. K. N.

2. The business of the partnership shall be in money-lending as heretofore.

3. This partnership will hold good for a period of five years commencing from the date of this instrument and it shall not be competent to any of the parties to this instrument at any time during that period to call for a dissolution thereof. Thereafter it shall continue so long as the parties hereto are willing subject only to the condition hereinafter appearing, *viz.*, if any partner or partners shall be desirous of determining the partnership and of such a desire shall give not less than six calendar months previous notice in writing to the other partner or partners then, immediately upon the end of the period specified in such notice, this partnership shall determine.

4. The capital of the partnership shall be Rs. 44,100 the same having been already brought into the business by the parties hereto and it shall, as hitherto, stand appropriated between the several places of business in the manner herein-after appearing, *viz.*, to Rangoon Rs. 12,600, to Wanema Rs. 14,700, and to

Colombo Rs. 16,800. It shall not be competent to any partner at any time during the continuance of this partnership to withdraw that capital or any portion of it in any manner whatsoever. But it shall be competent to the partners by mutual consent among themselves to increase that capital on such terms and conditions as they may from time to time determine among themselves in this behalf.

5. The business of the partnership shall be managed in such manner as the parties hereto may arrange among themselves from time to time.

6. The net profits of the partnership remaining after providing for the payment of the expenses of the management, payment of interest on current loans and fixed deposits, and payment of taxes due to Government and local bodies, if any, shall be apportioned among the parties hereto in equal proportions. Such apportionment shall take place separately for each branch generally once every three years.

7. No partner shall be at liberty to draw any funds from the partnership except to the extent which may be at his personal credit in the partnership accounts. But if by the consent of the remaining partners any partner is allowed to draw any sum he shall pay interest thereon at such rates as the parties by mutual consent shall fix in this behalf.

In witness hereof the parties to this indenture set their hands hereunto this 25th day of March 1924

(Signed) O. L. K. K. N. Kannappa Chetty,
for O. L. K. K. N.

Exhibit D (Series).

IN THE COURT OF THE INCOME-TAX OFFICER, SIVAGANGA.

In the matter of the Income-tax assessment proceedings.

I, Subramaniam Chettiar, son of Kailasam Chettiar, Hindu, Saivite, Nattukottai Chetty Caste, money-lender, aged about 45, and residing in the village of Sakkandi, Sivaganga Taluk, Ramnad District, do hereby solemnly and sincerely declare as follows:—

I have seen the Memorandum of this Honourable Court F. No. 443/24-25 dated 19th May 1925. I and my brothers are all divided in status. Except for the fact that we continue our ancestral business in common on a partnership basis, there is absolutely nothing in common between us. We have separate mess, separate worship and in fact everything separate. In the eyes of law there is absolutely no difference between our partnership and a partnership formed between persons who have no sort of relationship with each other. If this Honourable Court feels any doubt about it, we are prepared to publish to the world the fact about our divided status in whatever way this Honourable Court may consider necessary.

(Signed) O. L. K. K. N. Subramaniam Chetty.

SIVAGANGA,

3rd June 1925.

Solemnly affirmed before me this 3rd day of June 1925, the contents of the affidavit having been first truly and audibly read over to the declarant in Tamil he being unacquainted with English who appeared to have understood the same and signed his name in my presence.

(Signed) S. M. Narayana Iyengar,
Vice-President in charge of the
Sivaganga Taluq Board, Sivaganga.

Exhibit E.

Statement of O. L. K. K. N. Subramaniam Chettiar of Sakandi on oath.

It would now be about 20 years since our Chettiar (father) died. After that for about 6 or 7 years we were a joint family. It may be about 10 or 12 years since Ramanathan Chetty, the youngest brother attained majority. From the date of his attaining majority we became divided. We became divided by word of mouth. We have no accounts at our village. We do not maintain accounts because of our superstitious belief. The amounts in the share capital ledgers in our shops will stand in the name of O. L. K. K. N. and not in the name of each of us four individually. There was no dispute when we effected partition. I cannot however say definitely whether others knew it (partition) or not.

(Signed) O. L. K. K. N. Subramaniam Chettiar.

25—8—1925.

Taken down by me, read over to the deponent by his own Vakil and signed by the deponent in my presence.

(Signed) S. Lakshmana Sastri.

25—8—1925.

T. Rangachariar, for the assesseees.

M. Patunjali Sastri, for the Crown.

JUDGMENT.

The question referred for our decision is as follows:—

“Is it legal in the circumstances of this case to hold that the Hindu Mitakshara family consisting of the four brothers Kannappa Chettiar, Subramaniam Chettiar, Chidambaram Chettiar, and Ramanathan Chettiar is undivided.”

The first observation that has to be made with regard to the question submitted is that the question would seem to relate to the point of time when the question itself is submitted and the question propounded is whether at that point of time the family constituted by the brothers is undivided. There is no reference in the question to any partition alleged to have taken place at any point of time earlier. No question has also been raised with regard to the registration of the firm by the brothers and any legal consequences flowing therefrom.

We must take it therefore that the question referred to us is whether in view of the fact that all the four brothers have made statements before the Income-tax Officer that they have become divided in status, it is open to the Income-tax Officer to go behind those declarations and still hold that the family is undivided. It was no doubt open to the Income-tax Officer with reference to the earlier point of time and any allegation of a divided status on that day, to find on the facts that no such thing has been proved. / But no such question has been referred to us. On the affidavits and memoranda filed before the Income-tax Officer, it is clear that on that date at any rate the brothers had become divided in status by reason of their declarations to that effect set out in those documents.

We are not satisfied however that any answer to the question referred to us would be of any use to the Income-tax authorities in the matter of the assessment under reference. But having regard to the question propounded it seems to us that the only answer should be that in view at any rate of the statements made by all the parties that before the date of the statements they had become divided in status it will not be legal to hold that in spite of such declarations they still continue undivided.

There will be no order as to costs.

[193] IN THE HIGH COURT OF JUDICATURE AT MADRAS.
*Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Wallace and
 Mr. Justice Beasley.*

[5th May, 1927]

The Trichinopoly Tennore Hindu Permanent Fund, Ltd. . . . *Assesseees.**
v.

The Commissioner of Income-tax, Madras . . . *Referring Officer.*

Income-tax Act (XI of 1922), Sec. 10—Trichinopoly Tennore Hindu Permanent Fund—Registration under the Companies Act—Capital partly in permanent paid-up shares and partly in term shares—Loans to shareholders and non-shareholders and deposits received from non-members—Bulk of transactions with non-members—Net earnings distributed as dividend to shareholders only—Fund, if a Mutual Benefit Society—Assessability as a company.

The Trichinopoly Tennore Hindu Permanent Fund registered under the Companies Act had its share capital consisting of 1,800 fully paid permanent shares of Rs. 50 each, termed paid-up capital and of 2,333 term shares of Rs. 90 each payable in 45 monthly instalments, called the subscription capital. Besides the permanent shareholders and the term shareholders or the subscribers, there were monthly depositors who under the bye-laws were practically on the same footing as the term shareholders, but were not subject to the losses or liabilities of the Fund. The object of the Fund was set out to be "to enable persons to save money and to secure loans at favourable rates of interest." The Fund was doing money-lending business by receiving deposits from non-shareholders and lending money to shareholders and non-shareholders no special concession being shown to shareholders and the bulk of its transactions were with non-members or non-shareholders. The net profits arising from the earnings of the Fund were distributed as dividend among the shareholders only, the depositors and borrowers having nothing to do with the management. On the Fund claiming to be assessed as a Mutual Benefit Society on its income earned from non-members only,

Held, that in the constitution and objects of the Fund there being no principle of mutuality, no purpose of mutual benefit to be obtained or derivable from membership alone, the Fund was not a Mutual Benefit Society entitled to be assessed as such under the ruling in the *Mylapore Hindu Permanent Fund Case* and that the net profits of the Fund were assessable in full.

Board of Revenue v. The Mylapore Hindu Permanent Fund, 1 I. T. C. 217; *The New York Life Insurance Co. v. Styles*, 2 Tax Cases 460, distinguished.

Case [Referred Case No. 12 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

I have the honour to refer, for the decision of the Hon'ble the Judges of the High Court, the following questions of law which have arisen in assessing the Trichinopoly Tennore Hindu Permanent Fund:—

(1) Should this fund be assessed as a Mutual Benefit Society or as a company, *i.e.*, should the assessment be made only on the income earned from non-members or on the total income?

(2) If the Fund should be assessed as a Mutual Benefit Society, *i.e.*, only on its income from non-members, are the depositors members of the Fund?

(3) Should the sums paid to the term shareholders and depositors in respect of subscriptions and deposits be deducted as expenditure incurred solely for the purpose of earning the profits or gains of the Fund?

2. The recent history of the assessment of this Fund is as follows:—

While the case of the Mylapore Hindu Permanent Fund was before the High Court, the Trichinopoly Tennore Hindu Permanent Fund along with other

* (1927) 53 M. I. J. 881; A. I. R. (1927) Mad. 1078 1071 C. 291

so-called Mutual Benefit Societies submitted a copy of a printed memorial to the Finance Department of the Government of India asking that they should be prescribed under the explanation to section 10 (2) (iii), i.e., that the recurring subscriptions paid by their shareholders or subscribers should be deemed to be capital borrowed for the purposes of the business. When the High Court's decision in the case of the Mylapore Hindu Permanent Fund was announced, it was thought that there was no need for the Government of India to prescribe any Mutual Benefit Societies under the explanation mentioned above. I accordingly informed the Secretary to the Trichinopoly Tennore Hindu Permanent Fund that the Income-tax authorities would follow the decision of the High Court in respect of Mutual Benefit Societies, i.e., would only assess the income not derived from members. On that understanding the Secretary withdrew his memorial to the Government of India. For the next two years therefore the Society was only assessed on its profits derived from non-members. For the year 1925-26 it made a return accordingly. The Income-tax Officer, however, looked more closely into the working of this particular fund and came to the conclusion that its constitution was different from that of other Mutual Benefit Societies and that it was not a Mutual Benefit Society because its transactions with outsiders constitute a very large proportion of its total transactions. He accordingly held that the society was a mere banking concern with limited liability and taxed it on its total profits. This decision was upheld by the Assistant Commissioner on appeal and the Fund has accordingly applied for a reference to the High Court on the questions set out above.

3. The petitioner Fund is a company registered under the Indian Companies Act. A copy of its Memorandum and Articles of Association is appended—Exhibit A.* The nominal capital of the Company is Rs. 2,99,970 made up as follows:—

(i) One thousand eight hundred fully paid-up permanent shares of Rs. 50 each amounting to Rs. 90,000. This is called the paid-up capital.

(ii) Two thousand three hundred and thirty-three term shares of Rs. 90 each payable in 45 monthly instalments of Rs. 2 amounting to Rs. 2,09,970. This is called 'subscription capital'.

The objects of the Fund according to its Memorandum of Association are—

- (a) to enable persons to save money,
- (b) to enable persons to secure loans at favourable rates of interest on sufficient securities, and
- (c) to do such other things as are incidental or conducive to the attainment of the above objects.

The Fund carries on banking business and its affairs are managed by a Managing Committee elected by the General Body of members of the Fund (Articles 57 and 65). The General Body consists of the shareholders of the Fund, i.e., the permanent shareholders and the term shareholders or subscribers (Article 2).

The Managing Committee of the Company is granted power to invite deposits (Article 30). The various classes of deposits received by the Fund are—

- (i) Security deposits [i.e., deposits received from the office-bearers and staff of the Fund.]
- (ii) Fixed deposits
- (iii) Monthly deposits (i.e., deposits received in successive monthly instalments for a period of 21, 45 and 83 calendar months and returned at the

end of these periods with interest at $6\frac{1}{4}$ per cent. per annum on the average amount deposited during the stipulated period.)

(iv) Current deposits.

These deposits are received from all persons, whether members of the Fund or not. In fact, it is these deposits that form the bulk of the money-lending capital of the Fund.

Loans are granted to the constituents of the Fund, i.e., members or shareholders, depositors, and others on cash security, movable security, immovable security, and personal security (Article 37).

The profits of the Fund, which are the excess of interest and other miscellaneous receipts over interest payments, establishment pay, and other miscellaneous charges, are divided among the shareholders, i.e., permanent and term shareholders, directors and charity funds in certain proportions (Article 55). The amounts paid to permanent shareholders are called 'dividends' and those paid to the term shareholders or subscribers are called 'profits' (Article 55). By-law (1) under Article 55 says: "No dividends to shareholders or profits to subscribers shall be payable except out of the net profit arising from the business of the Fund."

The Fund claims on the strength of the judgment of the Madras High Court in the *Mylapore Hindu Permanent Fund Case* ⁽¹⁾, that it should be assessed only on the income derived from non-members, i.e., from persons who are neither shareholders nor depositors of the Fund and requires me to refer to the High Court questions formulated at the beginning of this reference.

4. I am of opinion that the Fund is an ordinary trading concern and that the income derived by it from the exercise of its business should be assessed as a whole irrespective of the fact that a portion of its receipts is interest derived from transactions with its members. I consider that the decision of the Madras High Court in the case of the *Mylapore Hindu Permanent Fund* ⁽¹⁾ which followed the decision of the House of Lords in the case of *Styles v. The New York Life Insurance Co.* ⁽²⁾ is inapplicable to the present case. The principle underlying the decision of the House of Lords in *Styles* case, as I understand it, is that when a number of individuals agree to contribute funds for a common purpose such as the payment of annuities or of capital sums or all of them on the occurrence of events certain or uncertain, and stipulate that their contributions so far as they are not required for that purpose shall be paid back to them, the contributions so returned should not be regarded as profits. In distinguishing this case from that of *Last v. London Assurance Corporation* ⁽³⁾ decided by the same House of Lords, Lord Watson observed: "In *Styles*' case there are no shares or shareholders in the ordinary sense of the term, but each and every holder of a participating policy becomes *ipso facto* a partner of the company with a voice in the administration entitled to a share of its assets and liable for all losses incurred by it". In the *Mylapore Hindu Permanent Fund* the shareholders were the only constituents of the fund. It was they that subscribed the capital, took loans and paid the interest which was subsequently returned to them as profits. Relying on the decision of the House of Lords in *Styles*' case, the High Court held that, apart from the small amount invested outside in Government securities, the surplus was income earned from within, that is, from the members themselves and that it was not profit which was chargeable with income-tax.

(1) 1 I. T. C. 217.

(2) 2 Tax Cas. 460; 14 App. Cas. 381.

(3) 2 Tax Cas. 100; 10 App. Cas. 438.

5. It seems to me that the facts of the present case are altogether different from those existing in the case of the Mylapore Hindu Permanent Fund. Here there is a company registered under the Company's Act, with a share capital subscribed by its members. It invites deposits from persons who are not shareholders of the Fund and lends monies in the course of its business to all persons whether they are members of the Fund or not. In fact, the bulk of its transactions were with persons who were not members or shareholders of the Fund. For example, during the year of account the receipts of the Fund from its shareholders amounted to Rs. 6,633, whereas the interest received from depositors (who are not members or shareholders in the Fund) amounted to Rs. 15,883, and the interest received from those who are merely borrowers and have no other connection with the Fund amounted to Rs. 15,510. Under Articles 2 and 57 the depositors and borrowers have nothing to do with the management of the Fund; nor do they participate in the earnings of the Fund. The earnings of the Fund are distributed among its shareholders alone and the Fund, *i.e.*, the Company actually earns the profits that are ultimately distributed. In the case of the Mylapore Hindu Permanent Fund a certain number of people pooled money and divided it up among themselves and it was held that they could not be making a profit out of the process. In the present case this element of mutuality is absent. The Trichinopoly Tennore Hindu Permanent Fund is not a closed circle. As far as its receipts from its own members are concerned, it is in the same position as a Railway Co., carrying its own shareholders, or a bank lending money to its shareholders.

6. *Question (ii)*:—Under Article 2 of the Articles of Association of the Fund the General Body, which alone has a voice in the management of the Fund, comprises only permanent shareholders and subscribers. The depositors are not members of the General Body. Under Article 8 the term "members" includes shareholders (holders of permanent shares) and subscribers (term shareholders) but not depositors. Under Article 55 the depositors are not entitled to participate in the profits of the Fund, nor are they liable for its losses [Article 34, Bye-law 1 (*e*).] These facts make it clear that the depositors are not members of the Fund.

7. *Question (iii)*:—As far as the depositors are concerned, this question is based on a misapprehension. The depositors are only paid interest on their deposits and every interest payment has been allowed by the Income-tax Officer. The real question at issue is whether the portion of the profits which is distributed to the term shareholders is to be regarded as interest on borrowed capital. The petitioner wishes to bring this profit under the category of the 'guaranteed interest' to which reference was made in the *Mylapore Hindu Permanent Fund's* case. But here there is no such thing as guaranteed interest. The subscriber pays rupees two a month for 45 months. At the end of that period he ceases to be a shareholder and is entitled to a refund of the sum of rupees ninety subscribed by him. He is not guaranteed anything more, whereas in the case of the *Mylapore Hindu Permanent Fund*, the shareholder paid Rs. 84, and was entitled to receive Rs. 102-8-0. In this case, according to Article 55 (1) of the Bye-law, no dividends to shareholders or profits to subscribers are paid except out of the net profit arising from the business of the Fund. There is thus a radical difference between the two cases. The sums paid to the term shareholders or subscribers are ordinary dividends, or share of profits and seem to me clearly inadmissible as deductions from taxable profits. If the petitioners had pressed their memorial of February 1923, there would have been a full enquiry before any exemption was

granted and I do not think that the benefit of the exemption would have been extended to a company such as this which derives 82 per cent. of its receipts from non-members.

M. Subbaraya Aiyar for the assesseees.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

In this reference three questions have been referred to this Court by the Commissioner of Income-tax. Of these, questions Nos. 2 and 3 have not been pressed. Then question No. 1 remains, that is, "Should this Fund be assessed as a Mutual Benefit Society or as a company"? The Commissioner of Income-tax has decided that the Fund is not a Mutual Benefit Society and is therefore not entitled to the benefit of the ruling of this Court reported in *Board of Revenue v. Mylapore Fund* (1).

In the main this question is a question of fact and this Court will not differ from the finding unless that finding is vitiated by some error of law. The chief contention of the learned vakil who appears for the Fund is that the Commissioner has radically misunderstood the constitution of the Fund as set out in its Memorandum of Association and its Articles.

The point at issue is whether the Fund is a society constituted essentially for the mutual benefit of its members, or whether it is an ordinary money lending bank engaging in money-lending with a view to earning profit for distribution among its shareholders. A legal definition of a mutual benefit society has not been set out in any statute and we do not attempt such a definition here as it is not necessary. The claim put forward here on behalf of the Fund is that it is of the same nature and constituted on the same footing as the New York Life Insurance Co. in the reported case of *New York Life Insurance Co. v. Styles* (2) and as the Mylapore Hindu Permanent Fund in the case reported in *Board of Revenue v. Mylapore Hindu Permanent Fund* (1). If that claim is substantiated, then by force of these rulings the present Fund will be Mutual Benefit Society. We shall therefore examine that claim.

The New York Life Insurance Co. was founded on principles of Mutual Life Insurance. Two sorts of policies were issued, participating policies and non-participating. There were no shares, but the holder of every participating policy became *ipso facto* a partner, while the holder of a non-participating policy was a mere creditor without any interest in the assets or liabilities of the Company. The rate of premium for participating policy-holders was calculated from time to time at a figure sufficient to cover the probable disbursements. Then an account was taken of the transactions of the Company and the excess, if any, of premiums received over expenditure was returned or repaid to the members. The essential condition in the constitution of this company was that the contributions of the members so far as they were not required for the common purpose of the company should be repaid to them, that is; the aim of the Company was not to make a profit for distribution to members but to make no profit; any realisation of profit meant that the purpose of the company had so far been imperfectly fulfilled because too large a contribution had been levied. The return of such profit, if it could be called profit, to the members was merely a return to them of the excess of contribution which had been levied from them and any dividend, if it can be called a dividend, was paid to them not as shareholders but as policy-holders. In the report of that case at p. 411, Lord Macnaghton says: "What is to become of the surplus if every thing goes right?"

(1) 1 I. T. C. 217.

(2) 2 Tax Cas. 460; 14 App. Cas. 381.

The practice is to take an account every year of assets and liabilities and to give the insured the benefit of the surplus either by way of reduction of premiums or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required. I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors". That this was the principle underlying this decision is also the view adopted by Rowlatt, J., in *Liverpool Corn Trade Association v. Monks* (1) and it has been applied to a similar case, *Thomas v. Richard Evans and Co.*, and *Jones v. South West Lancashire Coal Owners' Association* (2) where the company was an association founded solely for affording indemnity to its members against compensation in respect of fatal accidents to workmen. In the case of the *Mylapore Hindu Permanent Fund* (3) the learned Judges held that it was on all fours with the New Lork Life Insurance Co., since the income did not come from outside, but from inside, and was therefore not taxable. There the capital was made up solely of investments by members, and the income was derived from interest earned on loans to members. The essence of the Society was mutuality and the members and constituents were one and the same.

Now we have to see whether the constitution of the present Company is at all on these lines of mutuality. Its object as set out in the Memorandum of Association is "to enable persons to save money" and "to secure loans at favourable rates of interest". This is a perfectly general object and there is no hint that those who are to be enabled to save money or to secure loans are confined to the members of the Company, or that the essence of the object is the low rate of interest, so that, for example, the purpose aimed at is not profits but a lowering of the rate of interest as far as possible. The stated object of this Fund is not incompatible with a purely business effort to make as much profit as possible out of lending money on favourable rate of interest. The capital paid up or subscribed is made up of shares limited in number and in value, and the shareholders and subscribers constitute the controlling authority, while membership is restricted to such shareholders or subscribers. Outside these members is a class called monthly depositors who are, by a Bye-law under Article 34 practically on the same footing as subscribers but are not subject to the losses and liabilities of the Fund. Here the principle of mutuality, if it existed before at all, is entirely abandoned. Loans are granted to any one and are of two kinds, 'term loans' restricted to subscribers and monthly depositors and 'temporary loans' to any constituent. There is no special concession whatever which is confined to shareholders and subscribers. They are exactly on the same footing as outsiders, for example, monthly depositors. Profits are distributed in the way of dividends in the ordinary business partition and are expressed to be "out of the net profit arising from the business of the Fund"—See Article 55 (1-a). There is no suggestion that the dividends paid to the shareholders and subscribers are merely by way of return of their original capital subscribed, and, as I have noticed, there is no hint that the aim of the Company is not to make a profit by lending money on interest. We find therefore in the constitution and objects of this Fund no purpose of mutual benefit, no society of persons banded together to lend money to each other, no benefit to be obtained by or derived from membership alone. The constitution of this Fund therefore

(1) (1926) 2 K. B. 110; 10 Tax Cas. 442.

(3) 1 I. T. C. 217.

(2) (1927) 1 K. B. 33.

differs fundamentally from that of the New York Life Insurance Co., or the Mylapore Hindu Permanent Fund and the claim of the Fund that they are entitled by virtue of the rulings in those cases to be exempt from taxation in regard to any of their profits cannot be sustained. The Commissioner had made no mistake in holding that there is here no Mutual Benefit Society and that the net profits of the Fund are taxable in full.

We must therefore answer this reference that this Fund should be assessed as a Company. The Fund will pay the costs of this reference which we fix at Rs. 250.

[194] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
Before Justice Sir. C. C. Ghose Kt., Justice Sir Philip Buckland, Kt., Mr.
Justice Suhrawardy, Mr. Justice Panton and Mr. Justice Mukerji.

AND AFTERWARDS

Before Sir George Rankin, Kt., Chief Justice and Mr. Justice Majumdar.

[14th March and 11th May 1927.]

Raja Probhat Chandra Barua

.. Assessee.*

v.

The Commissioner of Income-tax, Bengal

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (1) and 4 (3) (viii)—Permanent Settlement Regulations—Scope and limits of exemption from taxation conferred thereunder—Income from lands in permanently settled estates—If exempt from assessment to income-tax—Income from Paiali, Punyaha Nazar and Nazar for settlement, succession and partition petitions—If agricultural income—Assessability to income-tax.

On a reference to a FULL BENCH [Ghose, Buckland, Suhrawardy, Panton and Mukerji JJ].

Held, per curiam, (Suhrawardy and Mukerji, JJ dissiente); The income derived from lands in permanently settled estates is liable to assessment to income-tax subject to the exemptions provided in the Income-tax Act, the Permanent Settlement Regulations not conferring any exemption from assessment to income-tax.

Commissioner of Income-tax v. Zaminder of Singampatti, 1 I.T.C. 181; *Commissioner of Income-tax v. Indubhushan Sircar*, 2 I. T. C. 221; and *Maharaja of Dharbhanga v. Commissioner of Income-tax*, 1 I. T. C. 303 not followed. *Emperor v. Probhat Chandra Barua*, 1 I. T. C. 284; Approved.

Per Suhrawardy and Mukherji JJ.—The profits or income derived from the following sources, namely, *Jalkar*, Potteries and brickfields ground rents, fees for tying up boats, for storing crop purchases (*paiali*) and for cart stands, *Punyaha Nazar* and *Nazar* for succession, settlement and partition petitions, *Hats* and Bazaar ground rents and stall fees paid by temporary sellers thereon, are income or profits derivable from or referable to the lands and having regard to the terms of the Permanent Settlement Regulations, the income derived from the above sources in permanently settled estates is not liable to assessment to income-tax.

Per Rankin, C. J. and Majumdar, J. :—*Paiali*, i.e., fee received from land used for storing purchases of crops, *Punyaha Nazar*, or *Nazar* paid by tenants of agricultural holdings at the beginning of the Zamindari year and *Nazars* paid for petitions presented to the Zamindar dealing with questions of succession, settlement and partition, are not "agricultural income" within the meaning of Sec. 2 (1) of the Income-tax Act and hence not exempt from assessment under Sec. 4 (3) (viii) of the Act.

Mehr Bano Khanum v. Commissioner of Income-tax, 2 I. T. C. 99, Explained.

Per Majumdar, J. :—Obiter. *Nazars* paid for recognition of succession, partition or settlement may be 'agricultural income' as defined in Sec. 2 (1) (a) of the Act.

Case [Reference No. 1 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

* (1927) 54 Cal. 863; 31 C. W. N. 765 and 1047; 45 C. L. J. 323; 102 Ind. Cas. 845; A. I. R. (1927) Cal. 432 and 793.

CASE.

At the request of the assessee, Raja Probhat Chandra Barua, I have the honour to submit under section 66 (2) of the Indian Income-tax Act, 1922, the following questions for the decision of the Hon'ble High Court :—

I. Whether the following sources of income are agricultural and therefore exempted from assessment to Income-tax under section 4 (3) (viii) of the Act?

- (i) Jalkar or rents received from fisheries;
- (ii) Ground-rent from land used for potteries;
- (iii) Ground-rent from land used as brick fields;
- (iv) Fees received from the tying up of boats against the assessee's land;
- (v) Fees received from land used for storing purchases of crops (*paiali*);
- (vi) Fees received from cart stands;
- (vii) *Punycha Nazar*, or *Nazar* paid by tenants of agricultural holdings at the beginning of the zemindari year;
- (viii) *Nazar* for petitions presented to the zemindar, dealing with questions of succession, settlement and partition;
- (ix) Ground rent for permanent shops at *hauts* and bazaars;
- (x) Stall fees paid by temporary (daily) sellers at *hauts* and bazaars.

II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the *jama* at the Permanent Settlement is assessable for income-tax purposes?

III. Whether having regard to the terms of the Permanent Settlement Regulation income derived from the above sources in permanently settled estates, is liable to assessment to income-tax?

2. I am of opinion that none of the items mentioned in question 1 can be called agricultural income within the definition given in section 2 (1) of the Income-tax Act. The Judgment of the Deputy Commissioner, Goalpara as Assistant Commissioner of Income-tax deals fairly completely with these points, and I need not add much. *Jalkar* or rent received from fisheries has been held to be non-agricultural both by the Calcutta High Court in the previous reference case of the present assessee [Reported in 1 I. T. C. 284] and also by the Patna High Court in the case of the *Maharajadhiraj of Darbhanga* [Reported in 1 I. T. C. 303]. The latter ruling would also cover items (iv), (ix) and (x). As to item (v), it was held by the Calcutta High Court in the previous reference case of the present assessee that receipts from land used for storing timber by persons who bought and exported timber from the assessee's forests were not agricultural income. In my opinion fees received for the use of land for storing purchases of crops by visiting traders are on exactly the same footing and cannot be called agricultural. I have ascertained that the rents are levied on traders who may or may not be themselves agriculturists. I think it is clear that in buying and selling paddy they must be considered to be acting as traders and not as agriculturists. The same remark applies to the persons who pay the fees for the use of cart stands. The rents are paid by the owners of the carts some of whom may be agriculturists but they are used in bringing in sometimes in their own and sometimes in hired carts paddy which has been purchased in the country for sale in markets. It may occur that fees are levied on agriculturists bringing paddy in their own carts for sale in bazaars but in the main it is clear that the fees are paid by traders as

such. The only questions which to my mind present any difficulty are items (vii) and (viii). An endeavour has been made to bring these within the ruling in the case of *Nawabzadi Meher Banu Khanun v. The Secretary of State for India in Council* ⁽¹⁾ which decided that *Nazar* or *Selami* paid by a tenant to a landlord for the recognition of the transfer of a non-transferable holding is rent or revenue within the meaning of the expression as it occurs in section 2 (1) (a) of the Indian Income-tax Act (Act XI) of 1922 and as such it is exempt from assessment to income-tax; but in the course of the judgment of Mr. Justice Greaves in that case, it is stated that the amount then in question "was money which comes to the landlord by virtue of the fact that he is the owner of the land. Viewed in this light it clearly is derived from the land and is agricultural income within the definition thereof contained in the Income-tax Act and as such exempt from assessment to income-tax under that Act." This *obiter dictum* is exceedingly wide and would possibly cover the two items now under consideration. On the other hand it is clear that these receipts are illegal *abwabs* levied by the landlord, and as such are assessable under the ruling in the case of *Birendra Kisor Manikya v. The Secretary of State for India* ⁽²⁾ where it is laid down that "the contention that illegal *abwabs*, such as *uttarayan* constitute agricultural income, is manifestly untenable. The item *uttarayan* is a voluntary payment, made by tenants, at one pice per rupee of their rents, for expenses of the Bastu Puja on the Uttarayan Sankranti day The item consequently is an illegal exaction and cannot, on the widest interpretation which may be placed on the phrase 'rent or revenue' be possibly included therein; nor can it be said to be derived, that is drawn, or obtained from the land". This is, I think, clear authority that *Punyaha Nazar* and *Nazar* on petitions presented to the zemindars are assessable to income-tax.

With the remaining questions it had not been my intention to trouble the Hon'ble High Court but the recent decision in the case of *Commissioner of Income-tax v. Indu Bhushan Sircar* ⁽³⁾ in which the decision of the Court in the previous case of *Emperor v. Raja Probhat Chandra Barua* ⁽⁴⁾ was not followed compels me again to ask for direction. The dispute concerns the same items of receipts as are mentioned above as claimed under the head "agricultural income." Some of these such as "*Jalkar*" were admittedly taken into account in assessing the Jama at the time of the Permanent Settlement; some were not, such as the *abwabs*. The cases of some of the remaining items are not free from doubt but this is a question of fact which can be decided subsequently. It will not be necessary to go into the case of all of them.

4. I do not think it has been advanced previously that sources of income of permanently settled estates which were not taken into consideration at the time of the Permanent Settlement for fixing the Jama should be exempted from income-tax. In the Judgment of the Chief Justice of the Patna High Court in the case of *Maharajadhiraj of Darbhanga v. Commissioner of Income-tax* ⁽⁵⁾ at page 308 I find the following :—

"There can be no doubt that the Permanent Settlement exempted the proprietors for all time from enhancement of the revenue fixed in respect of the settled lands and three questions arise for consideration :—(1) does the settlement made with the predecessor of the assessee cover the *jalkar* and other rights, (2) does the imposition of income-tax on the income derived from these sources vary the terms of the Permanent Settlement, and

(1) 2 I. T. C. 99.
(4) 1 I. T. C. 284.

(2) 1 I. T. C. 87.

(3) 2 I. T. C. 221.
(5) 1 I. T. C. 303.

(3) if so, is the Income-tax Act sufficiently specific and unambiguous to indicate without reasonable doubt that it was the intention of the legislature to vary the bargain made at the time of the Permanent Settlement. *If the first of these questions should be answered in the negative the assessee will be liable as the other two questions do not in that event arise*'. In my opinion, therefore, the assessee is liable to be assessed to tax on sources of income which were not taken into consideration at the time of fixing the *jama* of the Permanent Settlement.

5. The third question has been dealt with elaborately in the Judgments of three High Courts, Calcutta, Patna and Madras, and I have no need to urge arguments which have previously been put forward. The law however requires me to state my opinion and I beg, therefore, to say that in my view the history of Income-tax legislation in India and the universal practice of the Income-tax Department in assessing to tax non-agricultural receipts arising from the permanently settled estates have established the contention that such receipts are liable to assessment to tax.

6. I do not think it necessary to forward all the papers in this case, as they are voluminous and mostly do not bear on the points now referred.

N. Sircar and Jatindra Mohan Choudhury, for the assessee.

Sir B. C. Mitter and Surendra Nath Guha, for the Crown.

JUDGMENT OF THE FULL BENCH.

GHOSE, J.—On the 12th March, 1926, the Commissioner of Income-tax, Assam, referred to this Court for decision, under section 66 (2) of the Indian Income-tax Act of 1922, the following questions :—

I. Whether the following sources of income are agricultural and, therefore, exempted from assessment to income-tax under section 4 (3) (viii) of the Act :—

- (i) *Jalkar* or rents received from fisheries.
- (ii) Ground rent from land used for potteries.
- (iii) Ground rent from land used as brick-fields.
- (iv) Fees received from the tying up of boats against the assessee's land
- (v) Fees received from land used for storing purchase of crops (*paiali*).
- (vi) Fees received from cart-stands.
- (vii) *Punyaha nazar* or *nazar* paid by tenants of agricultural holdings at the beginning of the zemindari year.
- (viii) *Nazar* for petitions presented to the zemindars dealing with questions of successions, settlement and partition.
- (ix) Ground rent for permanent shops at *hauts* and bazaars.
- (x) Stall fees paid by temporary (daily) sellers at *hauts* and bazaars.

II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the *jama* at the permanent settlement is assessable for income-tax purposes?

III. Whether having regard to the terms of the Permanent Settlement Regulation income derived from the above sources in permanently settled estates is liable to assessment to income-tax?

This Reference came on for hearing before the late Chief Justice and Mr. Justice Rankin, as he then was, on the 21st May, 1926, when the attention of the learned Judges having been drawn to the conflict of opinion, as dis-

closed in the judgments in the cases of *Emperor v. Raja Probhat Chandra Barua*, (1) and *Commissioner of Income-tax v. Indu Bhusan Sircar* (2), questions II and III were referred by the learned Judges to a Full Bench for decision. The case in *Emperor v. Probhat Chandra Barua* (1) was before a Division Bench, consisting of Mr. Justice Rankin and Mr. Justice Page. Mr. Justice Rankin held that income derived from fisheries and from *sthaljat* (i.e., land used for stacking timber) was not "agricultural income" or income derived from land which is used for agricultural purposes, within the meaning of sections 2 and 4 of the Income-tax Act, and that such income was liable to income-tax, notwithstanding the Permanent Settlement Regulations of 1793. Mr. Justice Page held that such income was not assessable to income-tax by reason of the Permanent Settlement Regulations. There being this difference of opinion between the two learned Judges, the opinion of the senior Judge Mr. Justice Rankin prevailed under section 36 of the Letters Patent.

The case in *Commissioner of Income-tax v. Indu Bhusan Sircar* (2) was before a Division Bench, consisting of Mr. Justice Cuming and Mr. Justice Page, and it was there decided that where income from fisheries lying within an estate was included in the assets upon which land revenue was assessed under the Permanent Settlement Regulations, income from such fisheries was not further liable to assessment under the Indian Income-tax Act.

The two questions referred to us are of very great importance, and we have had the advantage of hearing thereon Mr. Sircar, on behalf of the assessee, and Sir Binode Mitter, on behalf of the Crown, at length. We desire to express our acknowledgments to them for the great assistance which they have rendered to us. Question I is not before the Full Bench, but Mr. Sircar mentioned that his client contended that items (v), (vii) and (viii) came within the definition of agricultural income in the Income-tax Act and were, therefore, exempted from assessment to income-tax under section 4 (3) (viii) of the Act. This matter is not before us, and it will have to be considered hereafter.

The case comes from the district of Goalpara in Assam which, including the Garo Hills but excluding the Eastern Dooars, was originally part of the extensive Collectorate of Rangpur and as such formed part of the Province of Bengal which, by the Moghul Emperor's Firman of the 12th August, 1765, was transferred to the East India Company. From 1765 to 1822 the old thanas of Goalpara, Dhubri and Karaibari formed part of the Rangpur district, known as the Rangamati District. Under the provisions of Regulation X of 1822 these thanas were cut off from Rangpur and formed into a separate district with headquarters at Goalpara (see Sir Edward Gait's *History of Assam*, 2nd edition, page 298; Baden Powell's *Land Systems of British India*, Volume III, page 430; Sir William Ward's *Introduction to the Land Revenue Manual, Assam*, 1905). It is not and cannot be disputed that the assessee's estates, in respect of which the present question has arisen, were settled under the Permanent Regulation of 1793. (See Sir William Ward's *Introduction* referred to above, page liv; McNeil's *Revenue Administration of the Lower Provinces of Bengal*, page 44.)

On behalf of the assessee the case is put in this way: It is argued that it is clear that according to the engagement entered into at the time of the Permanent Settlement, the "jama" then fixed cannot be altered. It was declared by the Governor-General in Council that the zemindars and other proprietors of land and their heirs would be allowed to hold their estates at

such assessment for ever (see Regulation I of 1793, Section IV), and that the orders fixing the amount of the assessment were to be considered irrevocable and not liable to alteration by any persons whom the Court of Directors might appoint to the administration of the affairs of the East India Company (Section VII). At the conclusion of the Permanent Settlement, the Governor-General in Council expressed his confidence that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, would exert themselves in the cultivation of their lands under the certainty that they would enjoy exclusively the fruits of their own good management and industry and that no demand would ever be made upon them for the augmentation of the public assessment in consequence of the improvement of their respective estates. It is pointed out that until the Proclamation of the 22nd March, 1793, relative to the limitation of the public demand upon the lands in Bengal, Bihar and Orissa, the public demand upon each estate was liable to annual or frequent variation at the discretion of the Government. The amount of it was fixed upon an estimate formed by the public officers of the aggregate of the rents payable by the ryots or tenants for each bigha of land in cultivation, of which, after deducting the expenses of collection, ten-elevenths were usually considered as the right of the public and the remainder the share of the landholder. Refusal to pay the sum required of him was followed by his removal from the management of his lands and the public dues were either let in farm or collected by an officer of Government, and the above-mentioned share of the landholder or such sum, as special custom or the orders of Government might have fixed, was paid to him by the farmer or from the public treasury (see Preamble to Regulation II of 1793). When the country came under British administration, two fundamental measures essential to the attainment of increase and improvements in agriculture and, consequently, of the increase in the wealth of the country were decided upon, namely, that the property in the soil was declared to be vested in the landholders and the revenue payable to Government from each estate was fixed for ever (see Preamble to Regulation II of 1793). The object, therefore, of the Permanent Settlement of 1793 being to limit the public demand upon lands in the provinces of Bengal, Bihar and Orissa, the tax under the Indian Income-tax Act, call it by whatever name you like, is, it is argued, an additional public demand upon the lands which were settled under the Permanent Settlement of 1793, and is therefore a violation of a positive statutory engagement made with the zemindars at the time of the Permanent Settlement. In other words, it is suggested that it is a breach of a promise made by Lord Cornwallis when the latter had exhausted the resources of language to assure the zemindars that the rate then assessed on their lands was irrevocably fixed for ever and that they should, in all future time, be "free from any further demand for rent, tribute or any arbitrary exaction whatsoever". It is further argued that the provisions of the Permanent Settlement of Bengal have in no way been repealed expressly or impliedly by the Indian Income-tax Act of 1922, and that, therefore, the generality of the words used in the charging sections of the Income-tax Act is inapplicable to zemindars whose lands lie in permanently-settled estates and with whom a binding engagement was entered into by the State in 1793. It is not suggested that zemindars as a body are immune from all taxation, but the contention is that they cannot be made to pay taxes on profits derived from lands in permanently-settled estates, because such taxes are in reality additions to the burdens of land which were fixed in 1793 and which were to remain unalterable for ever. It is urged that the Permanent Settlement Regulation of 1793 being an earlier statute on a special subject and the Indian Income-tax Act of 1922 being a subsequent enactment of a general nature, the Court will not hold that the earlier and

special legislation has been indirectly repealed, altered or derogated from merely by force of general words used in the subsequent legislation, without any indication of a particular intention to do so (see *Seward v. Vera Cruz*), (1) On all these grounds, the assessee has contended before us that the answer to the third question referred to us should be in the negative, the question being slightly altered in manner following, namely, whether, having regard to the terms of the Permanent Settlement Regulations, income derived from land in permanently-settled estates subject to the exemptions provided by the Legislature is liable to assessment to income-tax. The assessee has suggested the slight alteration indicated above in the third question, because his argument is that whether any particular items of income were or were not taken into consideration at the time of fixing the *jama* at the Permanent Settlement, income derived from land in permanently-settled estates subject as stated above is not and cannot be made liable to assessment to income-tax.

On behalf of the Crown it has been strenuously contended before us by Sir Binode Mitter that there was no such promise made to the actual proprietors of lands which were settled at the time of the Permanent Settlement of Bengal, Bihar and Orissa as alleged on behalf of the assessee; that there are no words in Regulation I of 1793 or in other regulations promulgated in the same year from which the inference can be legitimately drawn that there is a statutory obligation not to impose on holders of such lands any other tax whatsoever; that all that was decided in 1793 was that the *jama* or revenue on lands should be treated as fixed for ever and, therefore, could not be enhanced or altered; that the Legislature is competent to assess the income derived from land in permanently-settled estates, subject to exemptions provided for by the Legislature itself to income-tax; that the words used in the charging sections of the Indian Income-tax Act, 1922, were very wide and that they must include income from land in permanently-settled estates, subject to the said exemptions; that the rule about a subsequent enactment of a general nature not being held to affect in any manner an earlier statute on a special subject cannot be pushed too far, inasmuch as the subject matter of taxation under the later statute is different from the subject matter of taxation under Regulation I of 1793, i.e., the subject matters of taxation under Regulation I of 1793, and the Indian Income-tax Act, 1922, are financially and economically different, and that having regard to the express specification of certain exemptions only, the present assessee's claim must fail.

These being the respective contentions of the parties, the first question that arises is what was the nature and effect of the Permanent Settlement of lands under Regulation I of 1793 under which, roughly speaking, about 120,000 out of the whole area of 140,000 square miles of the Lower Provinces of Bengal were settled. Was it a settlement merely of the revenue derivable from land which was declared to be fixed and unalterable for ever, or was it in addition to this, a general absolution to holders of land under the permanent settlement, declaring their immunity from all further taxation in respect of profits derived from land? The answers to these questions must depend primarily and principally upon the language used in Regulation I of 1793 and in the connected regulations; but to understand the nature of the transaction embodied in the Permanent Settlement of Bengal, Bihar and Orissa it may be useful and indeed desirable to refer briefly to certain antecedent transactions which are matters of history. From the period of the East India Company's accession to the financial administration of Bengal, Bihar and Orissa by the Dewany Grant of 1765, one settlement of land revenue only, that of 1772, was

concluded by Warren Hastings for a term of five years; and this was made chiefly with farmers, to the exclusion of the hereditary landholders. With this exception, the settlements of revenue, *mal* and *sayer*, were in general adjusted from year to year, in some instances with the landholders and in others with farmers, e.g., the settlements for 1777, 1778, 1779 and 1780. When the zemindars or landholders declined to enter into engagements in respect of the revenue demanded from them, the rents payable by the under-tenants were collected immediately from them under what was known as *khas* management by the officers of Government, an allowance, usually 1/10th of the actual receipts from the lands, when held *khas*, being given to the dispossessed zemindar or landholder. It was a system which was described by the Court of Directors as inimical to the general prosperity of the country and a striking provision in Pitt's India Act of 1784 (24 Geo. III, c. XXV) declared that "And whereas complaints have prevailed, that divers Rajas, Zemindars and other native landholders have been unjustly deprived of their lands, jurisdictions, and privileges or that the tribute, rents, and services required to be by them paid or performed for their possessions to the Company are become grievous and oppressive; and whereas the principles of justice and the honour of this country require that such complaints should be forthwith enquired into and fully investigated, and if founded in truth effectually redressed: Be it therefore enacted, that the Court of Directors shall forthwith take the said matters into their serious consideration, and adopt such methods for enquiring into the truth of the complaints as they shall think best adopted for that purpose; and thereupon give orders to the several Governments and Presidencies in India, for effectually redressing, in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the Rajas, Zemindars and other native landholders may have sustained, and for the settling, upon principles of moderation and justice according to the laws and constitution of India, the permanent rules by which their tributes, rents and services shall be in future rendered and paid to the Company." Thereafter, enquiries and investigations followed, and in 1790-91 a complete Code of Regulations for the conclusion of a new settlement of the land revenue for Bengal, Bihar and Orissa was promulgated by Lord Cornwallis. The Decennial Settlement of 1790-91 was made permanent by Regulation I of 1793. The settlement embraced, roughly speaking, the tracts of the country now comprised in the divisions of Burdwan, the Presidency, Rajshahi, Dacca, Chittagong, Patna and Bhagalpur exclusive of part of the Santal Pargannas. It also extended to Hazaribagh and Manbhum districts in the Chota-Nagpur Division and to Jalpaiguri and Goalpara then forming part of the Rangpur Collectorate. Whether this arrangement was the one best adopted to obtain the greatest income with the least pressure and whether a temporary instead of a permanent settlement would not have been more advantageous to all parties are questions which have given rise to much discussion; but they lie outside our province and are not germane to the present enquiry.

Prior to the Decennial Settlement the zemindar was in reality merely a head receiver or collector of the Government land revenue from the under-tenants. He was never at any time the absolute proprietor of the estates held by him. There was no fixed principle governing the rate of rent, or the mode of its recovery from the under-tenants. This want of settled rules and practice led to extortion, fraud and concealment; and to remedy this unsatisfactory state of land management, the Decennial Settlement was determined on and was, as stated above, eventually made perpetual. On the zemindars was thrown the onus of paying the revenue, they being considered persons

of substance. The punctuality of payment from zemindars was enforced by the penalty of confiscation of their estates in case of delay, but powers were given to the zemindars to collect from the ryots.

These being the circumstances leading to the Permanent Settlement of Bengal, Bihar and Orissa, let us now turn to the language used in Regulation I of 1793 and examine whether there is any foundation for the contention that having regard to the bargain made at the time of the Permanent Settlement, income derived from land in permanently-settled areas is not assessable to income-tax. It is, therefore, necessary to find out at the outset what was the precise language used by Lord Cornwallis in Regulation I of 1793 taken as a whole. The material provisions are as follows :—

“ 1. The following articles of the Proclamation *relative to the limitation of the public demand* upon the lands addressed by the Governor-General in Council to the zemindars, independent talukdars, and other actual proprietors of land paying revenue to Government, in the provinces of Bengal, Bihar and Orissa, are hereby enacted into a Regulation, which is to have force and effect from the 22nd March, 1793, the date of the Proclamation.

II. *Article I.*—In the original Regulations for the Decennial Settlement of the public revenues of Bengal, Bihar and Orissa, passed for those provinces respectively on the 18th September, 1789, and the 10th February, 1790, it was notified to the proprietors of land, with or on behalf of whom a settlement might be concluded, that the *jama assessed upon their lands under those regulations would be continued after the expiration of ten years, and remain unalterable for ever*, provided such continuance should meet with the approbation of the Honourable Court of Directors for the affairs of the East India Company, and not otherwise.

III. *Article II.*—The Marquis Cornwallis, Knight of the most Noble Order of the Garter, Governor-General in Council, now notifies to all zemindars, independent talukdars and other actual proprietors of land, paying revenue to Government, in the provinces of Bengal, Bihar and Orissa, *that he has been empowered by the Honourable Court of Directors for the affairs of the East India Company to declare the jama, which has been or may be assessed upon their lands under the Regulations abovementioned, fixed for ever.*

IV. *Article III.*—The Governor-General in Council accordingly declares to the zemindars, independent talukdars and other actual proprietors of land with or on behalf of whom a settlement has been concluded under the regulations above-mentioned, that at the expiration of the term of the settlement *no alteration will be made in the assessment which they have respectively engaged to pay, but that they, and their heirs and lawful successors, will be allowed to hold their estates at such assessment for ever.*

V. *Article IV.*—The lands of some zemindars, independent talukdars and other actual proprietors of land having been held *khas*, or let in farm in consequence of their refusing to pay the assessment required of them under the regulations above-mentioned, the Governor-General in Council now notifies to the zemindars, independent talukdars and other actual proprietors of land whose lands are held *khas*, that they shall be restored to the management of their lands upon their agreeing to the payment of the assessment which has been or may be required of them, in conformity to the regulations above-mentioned, and that *no alteration shall afterwards be made in that assessment, but that they and their heirs and lawful successors shall be permitted to hold their respective estates at such assessment for ever*; and he declares to the zemindars, independent talukdars, and other actual proprietors of land whose lands have been let in farm, that they shall not regain possession of their

lands before the expiration of the period for which they have been farmed (unless the farmers shall voluntarily consent to make over to them the remaining term of their lease, and the Governor-General in Council shall approve of the transfer), but that at the expiration of that period upon their agreeing to the payment of the assessment which may be required of them, they *shall be reinstated and that no alteration shall afterwards be made in that assessment*, but that they and their heirs and lawful successors shall be allowed to hold their respective estates at such assessment for ever.

VI. *Article V.*—In the event of the proprietary right in lands that are, or may become, the property of Government being transferred to individuals, such individuals and their heirs and lawful successors shall be permitted to hold the lands at the assessment *at which they may be transferred for ever.*

VII. *Article VI.*—It is well known to the zemindars, independent talukdars and other actual proprietors of land as well as to the inhabitants of Bengal, Bihar and Orissa, in general, that, from the earliest times until the present period, the public assessment upon the lands has never been fixed, but that, according to established usage and custom, the rulers of these provinces have from time to time demanded an increase of assessment from the proprietors of land; and that, for the purpose of obtaining the increase not only frequent investigations have been made to ascertain the actual produce of their estates, but that it has been the practice to deprive them of the management of their lands, and either to let them in farm, or to appoint officers on the part of Government to collect the assessment immediately from the ryots. The Honourable Court of Directors, considering these usages and measures to be detrimental to the prosperity of the country, have with a view to promote the future ease and happiness of the people, authorised the foregoing declarations; and the zemindars, independent talukdars and other actual proprietors of land, with or on behalf of whom a settlement has been or may be concluded, are to *consider these orders fixing the amount of the assessment as irrevocable and not liable to alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country.*

The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever will exert themselves in the cultivation of their lands under the certainty that *they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates.*

The words “public assessment being fixed, under the certainty that they would enjoy exclusively” and “that no demand would ever be made upon them for an augmentation of the assessment” were stressed by learned Counsel on behalf of the assessee, and it was argued that the same principle which prevented an augmentation of the assessment ought equally to preclude the taxation of the landholders in respect of the rent or produce of their estates because such taxation must necessarily prevent them from enjoying exclusively the fruits of their own good management and industry. No doubt, the words used by Lord Cornwallis in Regulation I of 1793, taken by themselves and apart from what has been called their historical setting, may lend a certain amount of colour to the contention put forward on behalf of the assessee; but in my view the settlement made in 1790-91 by Lord Cornwallis, commonly called the “Decennial Settlement” differed in no respect from an ordinary settlement of land except that it was made for 10 years in place of

being annual, as was then the practice. The Court of Directors approved in 1792 that it should be made permanent and Lord Cornwallis issued a Proclamation fixing the 10 years' settlement for ever. The clear purport of the declaration made in Regulation I of 1793 is, in my judgment, nothing more than this, *viz.*, that the re-assessment of the estates in question was for ever barred. In other words, the land assessment then farmed was to be considered the permanent and unalterable revenue of the territorial possessions of the East India Company in Bengal, so that no discretion might be exercised by the Company's servants in any case of introducing any alteration whatsoever. By Regulation XIX of 1793 it was stated that "by the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind according to local custom) unless he transfers his right thereto for a term of any perpetuity or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public whilst he continues to discharge the latter." As I read these words and the words used in Regulation I of 1793 along with the words in Regulation VIII of 1793 which provided that the assessment should be regulated as to leave to the proprietors a provision for themselves and families equal to about 10 per cent. on the amount of their contribution to Government, the conclusion, to my mind, is irresistible that what was levied in 1793 was by virtue of a substantive and paramount title vested in the State. Regulation I of 1793, therefore, was so framed as to operate as an ample and complete guarantee that no resettlement of the estates referred to therein should ever take effect. But it seems to me that no guarantee was ever given that the proprietors of these estates should never, at any time, be called upon to aid in the relief of the future necessities of the Government of the land (see in this connexion the significant words used by Lord Cornwallis in the second clause of Article VII of Regulation I of 1793). The conclusion I have come to is, in my opinion, amply supported by the terms of Regulation XIX of 1793 which be it noted was passed on the same date, namely, the 1st May, 1793, and which laid down the rules by which rent-free tenures should be held valid. In the case of a valid rent-free tenure, Regulation XIX provides that no revenue at all should be demanded, just as Regulation I of 1793 provided that in the case of a permanently-settled estate no additional revenue should at any time be assessed. Both these Regulations treated the same subject matter, *viz.*, revenue; and they treated in the same way, namely, by barring future assessment. Would it be or could it be contended that the proprietors of valid rent-free tenures held under Regulation XIX of 1793 were and are absolutely exempted from liability to contribute to the general taxation of the country? The answer to that question must, in my judgment, be in the negative in the clearest manner possible. When Lord Cornwallis spoke of the "public demand" being fixed and made permanent and being limited for ever, what is it that he meant? Lord Cornwallis held the view as is clear from the Regulations, that the true wealth of a Government lay in the growing wealth of its people and the fiscal system which must encourage the accumulation and enjoyment of capital in private hands must in the long run be the one most profitable to the State. In this connexion I desire to adopt if I may, as part of my judgment, a few words from the Despatch of the Secretary of State for India in Council, dated the 12th May, 1870, being the same Despatch from which my brother Page quoted a few extracts in his judgment in the case, *Emperor v. Probath Chandra Barua* (1). The Duke of Argyll then

observed as follows : " The great object and purpose of that settlement (the Permanent Settlement of Bengal), as clearly defined and described in Article VI, must govern our interpretation of its terms. That object, as this Article explains at length, was to be an end for ever to the practice of all former Governments of altering and raising the land taxes from time to time, so that the landholder was never sure for any definite period what proportion of the total produce of the soil might be enacted by the State. This uncertainty was to be set at rest for ever. The ' public demand ' was to be fixed and permanent." Such was the promise; and its scope and object were clearly explained in the concluding exhortation addressed to the landholders that " they would exert themselves in the cultivation of their lands under the certainty that they would enjoy exclusively the fruits of their own good management and that no demand would ever be made upon them or their heirs and successors by the present or any future Government for an augmentation of the public assessment in consequence of the improvement of their respective estates." These last words quoted by the Duke of Argyll, I repeat, illustrate the whole force of the argument; there is to be no increase of the " public demand " levied upon the Zemindars in consequence of the improvement of their estates. The implication, further, is (although the Legislature is all powerful) that there cannot be without being guilty of a singular and signal breach of faith, a " special tax " on zemindars with whom the permanent settlement was concluded, which would operate as an increase of the " public demand " levied in respect of land upon zemindars in consequence of the improvement of their estates; but in my judgment, there was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a " general " tax upon incomes of *all* persons irrespective of the fact whether they are zemindars with whom the permanent settlement was concluded or not. A " general " tax is no doubt a " public demand," but it is one which is levied upon a wholly different principle and in respect of a wholly different kind of liability : such a " public demand " is no doubt a demand made upon zemindars with whom the permanent settlement was concluded, but it is made upon them in company with other classes of the community and with no exclusive reference to the source from which their incomes are derived. On these grounds, I am of opinion that the first contention urged before us on behalf of the assessee must fail, and it is accordingly negatived.

But assume that I am wrong in the conclusion to which I have come, it is then necessary to examine whether the words used in the charging sections of the Indian Income-tax Act, 1922, subject to the exemptions provided for by the Legislature itself, are sufficiently wide in support of the contention that income from the profits of land in permanently settled estates, subject to the said exemptions, is liable to be assessed to income-tax. To start with, it is, in my opinion, unreasonable to hold that the Legislature in enacting the Indian Income-tax Act, 1922, had not had its attention directed to the terms of Regulation I of 1793. The permanent settlement of Bengal, Bihar and Orissa has been the subject of acute controversy ever since the days of Lord Dalhousie, and the question of the immunity of zemindars in permanently-settled areas from taxation has been canvassed so often and at such length that to suggest that the Legislature, in enacting the Indian Income-tax Act, 1922, was unmindful of the permanent settlement, is to state a proposition which carries its own refutation. The position, therefore, is that the Legislature, with the full knowledge of the existence of the permanent settlement and with the further knowledge, with which it must be credited, that the precise point now raised had been raised in the past, had deliberately chosen,

subject to the exemption of "agricultural income" (the other exemptions need not be considered in this case) to say that the Indian Income-tax Act, 1922, shall apply to all income, profits or gains, as described or comprised in Section 6 from whatever source derived, accruing or arising or received in British India, or deemed under the provisions of this Act to accrue, or to arise, or to be received in British India. In section 6 it is provided that "Save as otherwise provided by this Act the following heads of income, profits and gains shall be chargeable to income-tax in the manner hereinafter appearing, viz., (i) salaries, (ii) interest on securities, (iii) property, (iv) business, (v) professional earnings, (vi) other sources." Sections 7, 8, 9, 10 and 11 define the heads of income referred to above other than "Other Sources". Section 12 defines the expression "Other Sources", and it runs as follows: "The tax shall be payable by an assessee under the head 'Other Sources' in respect of income, profits and gains of every kind and from every source to which this Act applies (if not included under any of the preceding heads)." As I read these provisions, it is abundantly clear that the Legislature, notwithstanding the solemn covenant, which, it is alleged, Lord Cornwallis entered into with zemindars in permanently-settled areas, has deliberately included income from profits of land wherever situate, be the area permanently settled or non-permanently settled, as being assessable to income-tax. It may be that the Legislature has not said in the direct manner suggested by the assessee in the course of the argument that to the extent to which income from profits of land in permanently-settled areas is assessable to income-tax, the permanent settlement is repealed or abrogated or derogated from; but on looking at the matter purely as a question of construction of the charging sections in the Indian Income-tax Act, 1922, taken along with the exemptions, I am of opinion that the Legislature has said in the most direct manner possible and in clear and unambiguous language that the profits of land in India (by which expression I must include land in permanently-settled areas) are subject to statutory exemptions assessable to income-tax. But even if it be held that the Legislature has not directly said so, there is no escape from the conclusion that, by necessary implication, the Legislature has said that.

But it is said that the repeal or abrogation of the Permanent Settlement should have been in so many words and that the rule is that in the absence of such words the Court will not hold that the earlier legislation on a special subject has been in any way affected by the subsequent enactment of a general nature. Now, it is particularly important when one examines the nature of the contention herein put forward, to keep in mind the subject-matters of the legislation in 1793 and in 1922. As I have already said, what Regulation I of 1793 did was to fix the *jama* which had been assessed on the lands of zemindars and other actual proprietors, for ever. The word "taxation" was not used or referred to in any way. The Indian Income-tax Act of 1922 has in no way increased the *jama* which was fixed in 1793. As has been said, the financial policy of 1793 was not and could not have been the same as the financial policy in 1922 and, in these circumstances, it is difficult to see how the rule referred to above can possibly apply in the present case.

The general rule, no doubt, is that where two Acts are inconsistent or repugnant, the latest expression of the will of the Legislature must prevail, provided the Court is satisfied that the repeal of the prior enactment must flow from necessary implication. From this rule, it follows that if one statute enacts something in general terms, and afterwards another statute is passed on the same subject, the subsequent statute will usually be considered as repealing by implication the former statute. In certain cases again,

"special" Acts have been held impliedly to repeal a prior general Act. But in each case it depends on the particular terms of the statute in question. There is, again, the further rule that prior statutes are not to be held to be repealed by implication by subsequent statutes if the two are repugnant in cases where the prior enactment is special and the subsequent enactment is general. In support of this last mentioned proposition, learned Counsel on behalf of the assessee has quoted the well-known case of *Seward v. Vera Curz* (1) where Lord Selbourne observed as follows : "Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words without any indication of a particular intention to do so." There are numerous authorities laying down the same proposition in similar words, and the guiding rule is that each enactment must be construed according to its own subject-matter and its own terms. There is, however, a further proposition which has been recognised in several cases that the rule referred to above, namely, the rule in *Seward's* case, (1) must not be pressed too far, and that a general statute may repeal a particular statute of the subject-matter of the two legislations is one and the same. The test also is—Are the provisions of a later Act so inconsistent with or repugnant to the provisions of an earlier Act that the two cannot stand together ? In which cases, the maxim *Leges posteriores contrarias abrogant* must apply ? But where the Legislature passes a later Act without reference to an earlier Act and that earlier Act is one which has been in force for a long time and is, therefore, well known, it seems reasonable and proper that we should try to construe the two Acts consistently if it is possible to do so. In this case, as I have already said, the subject-matters of the two legislations are different; the later statute is on a subject which is financially and economically different from that dealt with in the statute of 1793; one deals with revenue assessed on lands, the other is a tax on profits. Therefore, in terms there is no contradiction (see in this connexion *Nova Scotia Steel and Coal Co. v. Minister of Finance and Customs* (2)). Is it not, therefore, right and reasonable to allow the two enactments to stand side by side as not being inconsistent ?

In my opinion it is not only desirable but necessary to see how the Legislature has interpreted or observed the fixity of public demand referred to or promised in 1793. I am not unmindful of the contentions which have been advanced by learned Counsel on behalf of the assessee in this connexion, namely, that in most of the previous statutes such as the Cess Acts referred to in the judgment of Mr. Justice Mullick in the case of *Maharajadhiraj Bahadur of Darbhanga v. The Commissioner of Income-tax* (3), there was a direct reference to land in permanently-settled areas; but I have in my mind at the present moment the various Income-tax Acts imposed in India since 1860. The Income-tax Act of 1860, which was for a period of 5 years only and which imposed a 3 per cent. tax, made no distinction between agricultural income and non-agricultural income, and it included income derived from land in India where ever situate. Such income was taxed directly. The Act of 1860, as I have said ceased to operate in 1865. In 1867 it was again brought into operation, and this time the Act excluded agricultural income. In 1869 what was known as the Certificate Tax Act was converted into a general Income-tax Act, and it included agricultural income. Thereafter, it appears that for some time there was no tax on incomes. In 1872 an Act was passed for imposing duties on incomes arising from offices, properties, professions and trades, to be in force for one year only. Section 21 of this Act is important. By that section it was provided

(1) 10 App. Cas. 59.

(2) (1922) 2 A. C. 176.

(3) 1 I. T. C. 303.

that owners of lands or houses occupying the same should be chargeable in respect of the annual value thereof at 9/10ths of the full rent at which such lands or houses were worth to be let for the year. It was further provided that the Local Governments may, with the sanction of the Governor-General in Council, prescribe for the whole or any part of the territories, subject to such Local Government's special rules for the assessment of income derived from land at an amount bearing a fixed proportion to the *revenue assessed thereon*. Then came in 1886 the Income-tax Act of that year, and taxes on incomes were made permanent. The Act of 1886 (the Legislature bearing no doubt in mind the fact that land from which agricultural income was derived was already subject to the payment of cesses under Act X of 1871) excluded agricultural income. It was described as an Act for imposing a tax on income derived from sources other than agriculture. It dealt with the question of land by way of exemption in section 5, but subject to the exemptions prescribed in that Act, income from land wherever situate was assessed to income-tax. Then followed the Act of 1918, and this with a slight alteration was followed by the present Act of 1922. It is argued that the main question now before us is whether, having regard to the language of the Act of 1922, there is or is not an exemption of all income derived from permanently-settled estates. I agree that that is the question to be solved; but in arriving at a solution of the question, it is in my opinion permissible to us to consider how the Legislature has hitherto regarded the validity or otherwise to the contention put forward by the assessee. The point has been so exhaustively dealt with by Mr. Justice Rankin and by Mr. Justice Mullick in the two cases, one in this Court and the other in the Patna High Court, and their conclusions have been laid down so clearly, that I think it will be a work of supererogation if I elaborate it further. I will content myself by quoting one passage only from the judgment of Mr. Justice Rankin with which I respectfully agree. His Lordship observed: "An express exemption which is large enough to cover all permanently-settled estates and which covers them to the full extent of agricultural purposes—if not somewhat further—cannot readily be taken as applying only to estates not permanently settled or as an addition to an *implied* exemption of all permanently-settled estates for all purposes *whatever*."

The matter really comes back to this, *viz.*, has the Legislature in enacting the Indian Income-tax Act, 1922, sufficiently expressed itself in declaring that income from land (by which expression I include revenue-free as well as revenue-paying lands) is assessable to income-tax. In my view the Legislature has so expressed itself and it has expressed itself in a manner as to leave no room for doubt. Our attention has been drawn to the case of the *Chief Commissioner of Income-tax of Madras v. The Zemindar of Singumputty* (1) where their Lordships had to consider the effect of the Income-tax Act, 1918, upon the Madras Regulation XXV of 1802, which declared "that no alteration would be made in the assessment which the proprietors have engaged to pay; but they and their heirs and lawful successors would be allowed to hold their estates at such assessment for ever." The Madras High Court held that there was no express modification or repeal of the exemptions existing under the Madras Regulations in the Indian Income-tax Act of 1918 (the Income-tax Act of 1922 is substantially similar in terms to that of 1918 for the purposes of the present argument). It was further held that it was impossible to treat as a legal and effective abrogation of the exemption by the words of section 3 of the Income-tax Act, 1918. Their Lordships referred to the case of the *Associated Newspapers, Ltd. v. The City of London Corporation* (2). What happened in that case was this: By Statute VII, Geo. III, c. 37, certain lands

(1) 1 I. T. C. 181.

(2) (1916) 2 A. C. 429.

in the city of London reclaimed from the river Thames were declared to vest in the owners free from all taxes and assessments whatsoever. In 1848, i.e., about 80 years later, the City of London Sewers Act was passed which imposed a new rate upon every occupier of a house or building within or partly within the city of London, whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable in respect thereof by reason of such house or building being situate in any precinct or extra parochial place or otherwise. The House of Lords held that these words did not take away the express exemption granted by the earlier statute. This case has been discussed in the case of *Pole-Carew v. Craddock* (1). There the facts were as follows: A ferry was established by and maintained under an Act of 1790, which was to be deemed to be a public Act and which contained a provision that the then proprietors or their respective heirs or assigns shall not be rated or assessed for or towards the payment of any tax, rate or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry. The question arose whether the exemption granted by the statute extended to parliamentary taxes in existence at the date of the Act and whether it included income-tax which was first imposed subsequently to the passing of the Act of 1790. It was held that the exemption extended to parliamentary taxes whether in existence at the date of the Act or not, and, therefore, it included income-tax. Lord Sterndale in his judgment observed as follows: "I think it is laid down quite clearly that where there is an exemption from all rates, taxes and assessments, or all rates, taxes and assessments, whatsoever or whatever, if there is any difference, that exemption has to be looked at in connexion with the subject-matter of the Act in which it is contained, and also in connexion with the context in which it occurs. It may be that when so looked at it may become necessary to limit the very wide terms in which the exemption is framed. An instance of that is to be found in the cases which have been decided upon the Act of Parliament which has been often under discussion, the Act of 7 Geo. 3, c. 37, which gave exemption to certain persons who reclaimed land from the river Thames for the purpose of the building of Blackfriars Bridge. The words of that exemption were 'free from all taxes and assessments whatsoever.' It has been quite clearly laid down with regard to that exemption that it applies only to local taxation and in a great measure upon this ground that the Act was in the nature of what has been sometimes called a bargain. It came into existence in these circumstances. The Corporation of London, who promoted the Bill, were anxious to get this land reclaimed and they offered terms to the persons who would do it, in the Act of Parliament. Looking at those circumstances and also at the context in which the words occurred, it was held that the Corporation could only have been offering an exemption from taxes which they had the power to impose, and that inasmuch as they had no power to impose what is called Imperial taxation or general taxation, the exemption could not refer to such taxation. That is an instance on the one side. To take an instance on the other side, in *Duke of Argyll v. Inland Revenue Commissioners* (2), where the exemption was from all taxes, it was held that that included all taxes of all description, and from the subject-matter it is difficult to see how the decision could have been otherwise. We start, therefore, with this that in construing the exemption you have to look to a certain extent to the subject-matter of the Act in which it is contained and to the context in which it occurs. But, of course, there is in this Act a very important difference in the language, and while you have to look at the circumstances and the context you must not omit to look also at the language. The language of the Act

(1) (1920) 3 K. B. 109; 7 Tax Cas. 488.

(2) 109 L. T. 893; 7 Tax Cas. 225.

of £790 is not 'all rates, taxes and assessments' simply, but 'any tax, rate or assessment whatsoever, Parliamentary or parochial, for or in respect of the said ferry, etc.....' It seems to me, it is quite clear that the words 'payment of any tax, rate or assessment whatsoever, Parliamentary or parochial' mean what they say, that the exemption is not to be confined to parochial taxation or parochial rating, but extends to general Parliamentary taxation such as is defined in the cases to which I have referred, and such general Parliamentary taxation includes the income-tax.' His Lordship then referred to the case of the *Associated Newspapers, Limited v. The City of London Corporation* (1) and stated that as he understood the decision in that case, it did away entirely with the meaning which had been attached to the earlier cases, namely, the meaning that unless altered by express words, an exemption from taxation related only to present and not to future taxation. In the view I have taken of the words used in the Permanent Settlement Regulations of 1793 the two cases last cited have really no bearing. The language used in 1793 is very different from the language used in the old English Statutes referred to in the cases before the House of Lords and before the King's Bench Division. I desire to repeat again that before effect is given to contentions founded on the cases just referred to, it is very important that the exemption claimed should be looked at in connexion with the subject-matter of the Act in which it is contained and also in connexion with the context in which it occurred. Indeed, this has been emphasized by Lord Sterndale, and, if the matter is looked at from this point of view, the present case would rather seem to be within the line of cases of which the case of *Nova Scotia Steel and Coal Co. v. Minister of Finance and Customs* (2) is an example.

The language used in Regulation I of 1793 may not inaptly be compared with the language used in section 4 of 23 Geo. II, c. XVI, which ran as follows: "And it is hereby enacted by the authority aforesaid that all and every contributor and contributors upon this Act duly paying the consideration or purchase money at the rate aforesaid at or before the respective days or times in this Act before limited in that behalf for such annuity or annuities as aforesaid or such as he, she or they may appoint his, her or their respective executors, administrators, successors or assigns, shall have, received and enjoyed and be entitled by virtue of this Act to have received and enjoyed their respective annuity and annuities so to be purchased out of the moneys by this Act appropriated or appointed for payment thereof as aforesaid and shall have good and sure estates and interests therein for ever, subject only to the proviso or condition of redemption in this Act afterwards contained concerning the same; and that all the said annuities to be purchased on this Act and the principal moneys paid for the same and every of them during the continuance thereof shall be free from all taxes, charges and impositions whatsoever." Now, the first English Income-tax Act was Mr. Pitt's Act in 1798, 5 years after Lord Cornwallis's Proclamation (incidentally, it may be remarked that in 1793 income-tax was not thought of anywhere in the British Empire—not merely in India but not even in the British Islands), but nobody has ever contended that notwithstanding the provisions of the Loan Act referred to above, by which the English national debt was contracted, that in a general tax upon income the exemption referred to above was at all applicable. The case of the present assessee is nowhere near so strong. In one sense, I agree that every form of taxation is indirect taxation of income from land of whatever character it is or may be, but it is indirect taxation of land, it is certainly not within the pledge which was given in 1793, assuming that on the words used the inference may be legitimately drawn that a pledge such as the assessee argues was given.

(1) (1916) 2 A. C. 429.

(2) (1922) 2 A. C. 176.

On all these grounds I am of opinion that income from land, subject to the exemptions in the Income-tax Act, is liable to be assessed to income-tax and that the answer to the third question subject to the said exemptions is in the affirmative. The answer to the second question, subject as stated above, is also in the affirmative.

BUCKLAND, J.—I concur.

SUHRAWARDY, J.—I have had the advantage of reading the judgment to be just delivered by my learned brother Mukerji, J., and I agree with him in his reasonings and conclusions.

PANTON, J.—I agree in the judgment delivered by my learned brother Mr. Justice Ghose.

MUKERJI, J.—The two questions referred to the Full Bench are:—

II. Whether income derived from such of the above sources as were not taken into consideration at the time of fixing the *jama* at the time of the Permanent Settlement is assessable for income-tax purposes.

III. Whether having regard to the terms of the Permanent Settlement Regulations, income derived from the above sources in permanently-settled estates is liable to assessment to income-tax.

The “above sources” referred to in these questions are: (i) *jalkar* or rents received from fisheries; (ii) ground rent from land used for potteries; (iii) ground rent from land used as brickfields; (iv) fees received from the tying up of boats against the assessee’s land; (v) fees received from land used for storing purchases of crops (*paiali*); (vi) fees received from cart-stands; (vii) *punyaha nazar* or *nazar* paid by tenants of agricultural holdings at the beginning of the zemindari year; (viii) *nazar* for petitions presented to the zemindar, dealing with questions of succession, settlement and partition; (ix) ground rent for permanent shops at *hauts* and bazaars; and (x) stall fees paid by temporary (daily) sellers at *hauts* and bazaars.

To answer these questions it is necessary to appreciate the true nature and effect of the settlement that was meant by the Permanent Settlement. This, no doubt, has to be gathered primarily from the regulation dealing with it, viz., Regulation I of 1793, but there are expressions used in that regulation, to realise the exact import and significance of which reference must be made to some of the other regulations that were passed at the same time, and a brief survey also of the history of events that led up to them is more than necessary, e.g., such expressions as the following: “the limitation of public demand upon the land” (Section I); “the *jama* assessed upon their lands under the regulations would be continued after the expiration of ten years and remain unalterable for ever” (Section II, Article I); “to declare the *jama* which has been or may be assessed upon their lands, under the regulations abovementioned, fixed for ever” (Section III, Article II); “at the expiration of the term of the settlement, no alteration will be made in the assessment which they have respectively engaged to pay but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever” (Section IV, Article III); “they and their heirs and lawful successors shall be allowed to hold their respective estates at such assessment for ever” (Section V, Article IV); “such individuals and their heirs and lawful successors shall be permitted to hold the land at the assessment at which they may be transferred for ever” (Section VI, Article V); “from the earliest times the public assessment upon the lands has never been fixed” and “the zemindars, independent talukdars or other actual proprietors of land, with or on behalf of whom a settlement has been or may be

concluded, are to consider these orders fixing the amount of the assessment as irrevocable and not liable to alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country" (Section VII, Article VI); and "for the limitation of the public demand upon the lands the net income and consequently the value (independent of any increase of rent obtainable by improvement) of any landed property.....will always be ascertainable by a comparison of the amount of the fixed *jama* assessed upon it" (Section X, Article IX).

Up to 1793 no general Code of law had been enacted for India; rules and orders were passed from time to time, but no systematic Code was framed. Regulation I of 1793 was passed on the 1st May, 1793, and on the same day forty-seven other regulations were passed. The regulation consisted of the Proclamation of Lord Cornwallis of the 22nd March, 1793, and was made law from that date. The proclamation was addressed to the "zemindars, independent talukdars and other actual proprietors of land paying revenue to Government in the provinces of Bengal, Bihar and Orissa." The opening words of Regulations XIX and XXXVII of 1793 and the first paragraph of Regulation II of 1793 explain the basis of the permanent settlement: "By the ancient law (*custom*, perhaps, would have been a better word) of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land (demandable in money or kind according to local custom). Unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public whilst he continues to discharge the latter" (Regulation XIX of 1793, Section I; see also Preamble to Regulation XXXVII of 1793) and "As being the two fundamental measures essential to the attainment of it, the property in the soil has been declared to be vested in the landholders; and the revenue payable to Government from each estate has been fixed for ever" (Regulation II of 1793, Section I). What is this "public demand" or "revenue" that was intended to be limited or fixed for ever, and what was the "*jama*" or "assessment" that was so fixed?

When by virtue of the grant of the Diwani in 1765 the task of administering the land and the revenue devolved upon the Company's servants, they found it too difficult for them to perform. They had been previously occupied solely in pursuit of trade and had very little opportunities of acquiring the requisite knowledge and experience, and accordingly they were placed in an extraordinary position. They followed for some time with little or no change the system of administration which had obtained before. It would be tedious to set out the changes that were introduced as regards the machinery of collection or the supervision that was to be exercised in that behalf, between then and the time of the Permanent Settlement, and this need not be done for our present purposes. It is noteworthy that in 1769 a letter of instruction was issued to the Supervisors, who were just then appointed to superintend the Indian officers employed throughout the country in collecting the revenue and administering justice—a memorable document—setting forth with remarkable perspicuity and scrupulous care the duties that they had to discharge, chief amongst which was to hold some elaborate enquiries. The two main objects of these enquiries, so far as land revenue was concerned, were to fix the amount of what the zemindar received from the ryot as his income or emolument, and to secure to the ryot, after he had supplied the legal dues of the Government, the enjoyment of the remainder. The task was too much for those by whom it was to be performed, and the enquiries were looked

upon with suspicion by those for whose benefit they were meant. Accordingly, the directions were countermanded and minute scrutinies were prohibited. The condition of the country was as unhappy as ever, and notwithstanding the Great Famine of 1770 and the consequent mortality and the decrease of cultivation, the standard of collection of revenue was maintained, nay it rather improved in consequence of violence and oppression and imposition of assessment on existing ryots to cover the loss that had been sustained by reason of the death or absconsion of others. In 1771, the Court of Directors sent out instructions to stand forth as the Diwan and by the Agency of the Company's servants to take upon themselves the entire care and management of the revenues. From 1765 to 1771, with the exception of the 24-Parganas, Burdwan, Midnapore and Chittagong, the other districts were left under Indian management. Bihar had been settled for a term of years, but the settlement for the revenue, *mal*, and *sayer*, in Bengal and Orissa had up to this time been from year to year. These settlements were made in some instances with landholders, in others with farmers, or when the former declined to engage for the revenue and no adequate proposal was made by the latter, the rents payable by the under-tenants used to be collected by the officers of Government under *khas* management. This fluctuating system was impolitic and fraught with evil. The old assessment at which revenue was collected was found to be too much for the country to bear and, accordingly, in 1772 measures were adopted with a view to make a quinquennial settlement of Bengal and Orissa. This settlement was made for the most part with farmers, as it was thought that the real value of the country could be better ascertained by letting it out in farm for a term of years to the highest bidder. Speculators, having no idea of the real capabilities of the country and incited by hopes of making the same large profits as could be reaped under the old system which was not particularly keen about punishing extortion or oppression, intervened and readily agreed for sums which eventually they were unable to pay. Experience thus showed the quinquennial settlement to be a mistake. In 1776, the Governor-General in Council submitted to the Court of Directors for approval a scheme for making life settlements with the zemindars, but it was not approved for certain "weighty reasons". In 1777 and thereafter, annual settlements were again made under the orders of the Court of Directors, preference being now given to zemindars whenever they were willing to a reasonable assessment.

In 1784, Statute 24, Geo. III, c. 25, was passed by the British Parliament, section 39 of which required to give orders "for settling and establishing upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which the tributes, rents and services of the rajas, zemindars, polygars, talukdars and other native holders should be in future rendered and paid to the United Company". In obedience to these requirements, orders were transmitted two years later to the Government of India for making inquiry into the condition of the landholders and other inhabitants residing under their authority and for the establishment of permanent rules for the settlement and collection of the revenue and administration of justice founded on the ancient laws and usages of the country, so as "to fix a permanent revenue on a review of the collections of former years, and that the settlement should, in every practicable instance, be made with the zemindars, rules being at the same time made for maintaining the rights of other classes according to the usages of the country," and they sent orders for decennial settlement in the first instance with a view to be made permanent on their approval. On receipt of these orders, most careful local enquiries were again made in order to obtain all possible and available information as to the past and present state of the country. The nature, extent and scope of these enquiries and the nature

of the settlement that was made by the Decennial Settlement may best be gathered from what Mr. Harrington says about them in his *Analysis of the Bengal Regulations*, Vol. II, pp. 174-177. He says thus:

“On receipt of these instructions, the most particular local enquiries were set on foot, to obtain all possible information of the former and present state of the several districts; the condition of the landholders and tenants of every description; their rights under the Moghul Government before its decline; the laws and usages which had since prevailed in settling the rents payable by the ryots, dependent talukdars, and other under-tenants, to the zemindars, independent talukdars, and other superior landholders; what new impositions and exactions had been introduced under the Company’s administration; what rules were required for securing the inferior occupants and immediate cultivators of the soil against oppression and extortion; and generally what measures should be adopted to remedy existing defects and abuses in the adjustment and collection of the land rents as well as in the *gunge*, *haut*, bazar, and other duties levied under the general denomination of *Sayer*. Detailed accounts of the assessment and actual collections in past years were also procured, with every other document which appeared material for determining a standard revenue for future years, such as the orders of the Court of Directors prescribed, and the landholders might be able to pay without distressing their tenants; and the voluminous reports of the Collectors, Board of Revenue, and other public officers, upon the inquiries made by them, were abridged and brought forward in a collective view, by a Member of the Government eminently distinguished for his talents, knowledge and experience whose minute on the settlement of Bengal, recorded the 18th June, 1789, was subsequently noticed by the Court of Directors as a ‘comprehensive and masterly dissertation, which not only exhibited and methodized the most material parts of the reports from the Collectors of the Bengal Province, but afforded new and important communications from himself, supplying, in various respects, what they wanted, delineating with great clearness the past financial system and history of Bengal, examining with candour those points in it which have been subjects of controversy, investigating with patient judgment the best system for that country, the difficulties which may attend it, the means of obviating them, and in fine, proposing from the whole a set of regulations for carrying into execution the orders of the Court respecting the decennial settlement so as to secure justice, both to the Government and to the subject; and to prevent, in future, those abuses, which either exist or may be apprehended, in the detail of the collection.’ On consideration of this document, with the papers which accompanied it, and a further minute from the same Member of Government, on the settlement of Bihar, recorded 18th September, 1789, the Governor-General in Council passed the rules, afterwards incorporated with amendments.....in Regulation VIII of 1793..... The primary rule directs that ‘a new settlement of the land revenue shall be concluded for a period of ten years, to commence with the Fussily, Villaity, and Bengal year 1197, for Bihar, Orissa and Bengal respectively.’ And by the succeeding rule it is ‘at the same time, notified to the proprietors of land, with whom the settlement may be concluded, that the assessment fixed by the decennial settlement, will be continued after the expiration of the ten years and remain unalterable for ever; provided such continuance shall meet with the approbation of the Honourable Court of Directors, but not otherwise.”

Then followed that memorable controversy between Lord Cornwallis and the Members of his Government in which he put forward cogent arguments for fixing “the Government demand” as the first measure necessary to be adopted to afford an opportunity to the landholder “of increasing

his profits by the improvement of his lands." He was of opinion that the potta regulations and a general reservation of the right of the Government to interfere for the protection of the ryots and the prohibition of new *abwabs* and such other small remedial measures would sufficiently protect the ryots and that the view of his opponents did not warrant the postponement of a measure which he deemed "best calculated to promote the substantial interest of the Company and of the British nation as well as the happiness and prosperity of the natives of India." The Court of Directors on examining the materials placed before them were strongly in favour of a permanent settlement and signified their approval of the decennial settlement being made permanent. They wrote back to that effect, expressing their intention in these words: "It being our intention in the whole of this measure effectually to limit our own demands, but not to depart from our inherent right, as Sovereigns, of being the guardians and protectors of every class of persons living under our Government," etc. The decennial settlement was thereupon made permanent by the Proclamation, dated the 22nd March, 1793, and subsequently enacted into Regulation I of 1793 as already stated. As regards the effect of the permanent settlement, in so far as its broad features are concerned as affecting the relations between the State, the zemindar and the ryot, two radically distinct views are sometimes taken. The advocates of one view say that before the permanent settlement there was a declaration by Government that it was necessary to secure the ryots in the perpetual, and undisturbed possession of their lands; that of the three parties concerned, viz., the State, the zemindar and the ryot, the ryot's was the dominant right, that is to say, he was proprietor; and the demand upon him was that of the State for a gross amount limited by custom and this was specifically limited by the regulation of 1793, out of which the State remunerated the zemindar; that the State was not the proprietor of the soil; its rights were limited by custom to the money value of a specific proportion of the produce of the land, and the authors of the permanent settlement limited it further by enactments which if carried out, according to the intention of the Legislature, would have given the same immunity to the ryot as is enjoyed by the zemindar against enhancement of rent from a rise of prices; and that the so-called proprietary right of the zemindar was a very limited one, and it was so greatly restricted that it was not *dominium* but *servitus*—a rent charge or, strictly speaking, a revenue charge upon property which belonged to another and which the zemindar had no power of turning to any use without buying it from the other who was the proprietor. The advocates of the other view maintain that there was no well-defined customary law, no known or settled rates of rent in existence in 1793; that the legislation of 1793 left the rights of the cultivator of the soil as indefinite and undefined as they were before; that the Government deliberately refrained from undertaking the difficult task of defining these rights and contented themselves with reserving a general power of interference in case of oppression; that the property in the soil which had never before been formally declared to be vested in the landholder was declared to be vested in them; and that the revenue payable to Government from each estate was fixed for ever.

The rights and duties of the zemindars in so far as they were declared by the Permanent Regulations may be matters of doubt. Whether when the English settlement was originally established in India they were owners of the soil subject only to a tribute to Government as was the opinion of the Lord Chancellor in *Freeman v. Fairlie* (1), or whether they had only certain restricted proprietary rights in the revenue which may fairly be considered

(1) (1828) 1 M. I. A. 305.

rights in the produce of the soil, and so in the soil itself, may be a matter of controversy. Whether by the mere description and enumeration of the classes to be settled with and by the recital of such settlement, (*e.g.*, the regulations of the 23rd November, 1792, Regulation II of 1793, and Regulation VIII of 1793) it was intended to take away the rights of the actual cultivators and possessors of the soil and vest them in the zemindars may be a debatable question, though it seems to be now settled that a settlement with a person for the purposes of revenue does not establish any proprietary right in the land in favour of the person settled with, if he did not already possess that right, but is made with Government only as to their claim to their revenue (*Juggut Mohini Dossee v. Mossummut Sokheemoney Dossee* (1)). Whether the rights of the cultivators of the soil were left as uncertain or unsettled as before or whether they were sufficiently protected in accordance with the original intention of the Court of Directors or of Lord Cornwallis himself are matters on which there may be two opinions. Opinion is also divided on the question of the justice, expediency or equities of the measure. The fact, however, that the Government limited its own demand upon the zemindar in so far as that demand related to the income that was derivable from the lands is a matter which can scarcely be doubted or disputed. The true view of this fixity of assessment is this: In the time of the Moghul and Muhammadan Governments the share of the State was uncertain, and so the share of the zemindar; the permanent settlement fixed and made certain the former, but left the latter as uncertain as ever. The zemindars thus came to know to a penny what they had to pay to the State at all future times. The second part of Section VII, Article VI of Regulation I of 1793 runs in these words: "The Governor-General in Council trusts that the proprietors of lands sensible of the benefits conferred upon them by the public assessment being fixed for ever will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry and that no demand will ever be made upon them or their heirs or successors by the present or any future Government, for an augmentation of the public assessment in consequence of the improvement of their respective estates." No words can be clearer, no promise more definite. If language has any meaning, the declaration means that whatever may be the income or profits of the zemindar by reason of his having improved his estate, the same will not be further touched or taxed.

But was the public assessment not to be augmented in any way in future? The answer must be sought for in the Declaration itself, and the Declaration answers it in this way: It could be augmented in any way, so long as the method adopted did not mean to take away a portion of this income or profits, *qua* such income or profits. Indeed, there are the clearest possible indications within the regulations themselves to the effect that nothing was further from the minds of the authors of the permanent settlement than to forego for ever the right to impose taxes or cesses for ever. It is necessary, therefore, to examine the sources from which this augmentation was contemplated.

The right of establishing *Sayer* or internal duties was expressly reserved by Section VIII, Article VII, Clause (2) of Regulation I of 1793, and it was expressly stated that one of the consequences which the Government expected from retaining the privilege in its own hands was a future opportunity of augmenting the revenue in that way.

(1) (1871) 14 M. I. A. 289.

The Regulations upon this subject were re-enacted in Regulation XXVII of 1793. This regulation purported to re-enact with alterations and modifications the rules passed by the Governor-General in Council on the 11th June and on subsequent dates, for the resumption and abolition of the *Sayer*, or internal duties and taxes, throughout Bengal, Bihar and Orissa, and for adjusting and paying the deductions and compensations directed to be granted to the proprietors and farmers of estates paying revenue to Government and the holders of property exempt from the payment of revenue to Government on account of the duties and taxes abolished. The rules for the resumption of the *Sayer* passed on the 11th June, 1790, were re-enacted in Section II of this regulation. By these rules the right of the zemindars to collect the *Sayer* was taken away, compensation being given for the loss thus caused to them and the revenue derived from these collections was consequently excluded in assessing the *jama* at the time of the decennial and permanent settlements. The rules for the abolition of the *Sayer* passed on the 28th July, 1790, were enacted in Section IV of this Regulation. This section enacted: "The privilege of imposing and collecting internal duties has been resumed from the landholders, and taken exclusively into the hands of Government for the purpose of reforming abuses in these collections, and thereby affording benefit to the commerce of the country, as well as general ease to its inhabitants. For the more effectual attainments of these objects, the Governor-General in Council has now resolved that all duties, taxes and other collections coming under the denomination of *Sayer* (with the exception of the Government and Calcutta customs, the duties levied on pilgrims at Gaya and other places of pilgrimage, the abkarry or tax on spirituous liquors, which is to be collected on account of Government agreeably to former orders, the collections made in the gunges, bazaars and *hauts* situated within the limits of Calcutta, and such collections as are confirmed to the landholders, and the holders of gunges, bazaars and *hauts*, by the published resolutions of the 11th June, 1790, namely, rent paid for the use of land or for houses, shops or other buildings erected thereon, or for orchards, pasture-ground or fisheries, sometimes included in the *Sayer* under the denomination of *phulkar*, *bunkar* and *jalkar*); whether made by Europeans or natives, either on their own or the public account, in the gunges, bazaars, *hauts* or other places within the provinces, be forthwith abolished, and that the compensations to be made in consequence be regulated by an average of the nett produce stated in the past accounts, for as many years as they can be procured not exceeding ten (excluding therefrom such collections as have been prohibited by Government) and be adjusted, with regard to the collections in *Malguzarry* and *Lakheraj* lands respectively according to the principles already laid down in the resolutions of the 11th June, 1790." It was thus made clear that rent paid for the use of land, or for houses, shops or other buildings erected thereon or for orchards, pasture-ground, or fisheries, sometimes included in the *Sayer*, under the denomination of *phulkar*, *bunkar*, or *jalkar* was not *Sayer* within the meaning of the regulations.

That the right to taxation generally was not given up is amply clear upon other materials, but it is equally clear that the income or profits derivable from the lands was not to be taxed as such.

Lord Cornwallis's minute of the 3rd February, 1790, which was sent in circulation on the 7th and recorded on the 12th, also shows beyond the shadow of a doubt that the Government of 1789-1793 contemplated and expected that the improved condition of all classes would enable the expenses and requirements of Government to be provided by other forms of taxation.

He said: "There is this further advantage to be expected from a fixed assessment, in a country subject to draught and inundation, that it affords a strong inducement to the landholder to exert himself to repair as speedily as possible the damages which his lands may have sustained from these calamities; for it is to be expected that when the public demand upon his lands is limited to a particular sum, he will employ every means in his favour to render them capable of again paying that sum and as large a surplus, for his own use". . . . "The maxim that equality in taxation is an object of the greatest importance, and that in justice all the subjects of a State should contribute as nearly as possible in proportion to the income which they enjoy under its protection does not prove the expediency of varying the demand of Government upon the lands; on the contrary, we shall find that, in countries in which this maxim is one of the leading principles in the imposition of taxes, the valuation of the land on which they are levied is never varied. In raising a revenue to answer the public exigencies, we *ought to be careful to interfere as little as possible in those sources from which the wealth of the subject is derived.* Agriculture is the principal source of the riches of Bengal; the cultivator of the soil furnishes most of the materials for its numerous manufactures. In proportion as agriculture declines, the quantity of those materials must diminish, and the value of them increase and, consequently, the manufactures must become dearer, and the demand for them be gradually lessened. Improvement in agriculture will produce the opposite effects. The attention of Government ought, therefore, to be directed to render the assessment upon the lands as little burdensome as possible: this is to be accomplished only by fixing it. The proprietor will then have some inducement to improve his lands; and as his profits will increase in proportion to his exertions, he will gradually become better able to discharge the public revenue. *By reserving the collection of the internal duties on commerce, Government may at all times appropriate to itself a share of the accumulating wealth of its subjects, without their being sensible of it.* The burden will also be more equally distributed; at present the whole weight rests upon the landholders and cultivators of the soil."

Almost contemporaneously with the Permanent Settlement on the 6th March, 1793, Lord Cornwallis wrote to the Court of Directors: "We think this a proper opportunity to observe, that if, at any future period the public exigencies should require an addition to your resources, *you must look for this addition in the increase of the general wealth and commerce of the country and not in the augmentation of the tax upon the land.* Although agriculture and commerce promote each other, yet in this country, more than in any other, agriculture must flourish before commerce can become extensive. The materials for all the most valuable manufactures are the produce of its own lands. It follows, therefore, that the extent of its commerce must depend upon the encouragement given to agriculture; and that whatever tends to impede the latter, destroys the two great sources of its wealth. At present almost the whole of your revenue is raised upon the lands; and any attempt to participate with the landholders in the produce of the waste lands would (as we have said) operate to discourage their being brought into cultivation and, consequently, prevent the augmentation of articles for manufacture or export. The increase of cultivation (which nothing but permitting the landholders to reap the benefit of it can affect) will be productive of the opposite consequences. To what extent the trade and manufactures of this country may increase under the very liberal measures which have been adopted for enabling British subjects to convey their goods to Europe at a moderate freight, we can form no conjecture. We are satisfied, however,

that it will far exceed general expectation; and the duties on the import and export trade (*exclusive of any internal duties which it may in future be thought advisable to impose*) that may hereafter be levied, will afford an ample increase to your resources without burdening the people or affecting in any shape the industry of the country."

In 1811 the Court of Directors said: "It was, indeed, imagined at the period of the establishment of the Bengal settlement that in proportion as the effects naturally to be expected from an enlarged and liberal policy were developed, in proportion as the land was improved, activity given to commerce and as the people were enriched, our Government would be able, *by means of taxation on the necessities or luxuries of life*, not only to indemnify itself for the sacrifices it had made and for any contingent loss which it might sustain from the depreciation of money, but that our revenue might be made to advance in equal proportion with the prosperity of the country and that both would go on flourishing in rapid progression."

Thus, at the time and within 20 years of the Permanent Settlement, the source of such fresh taxation was clearly indicated. The italics in the extracts given in the above three paragraphs are mine.

A reservation of a right to impose further tax on the income or profits of the land which was given to the zemindar as the fruits of his own labour cannot be gleaned from any quarter. Whether a portion is taken as revenue and another under the head of income-tax, both are demands of the State, and when in assessing the revenue, a guarantee was given of its fixity and a declaration was made that the balance will not be altered at any time, to impose a further tax on the income or profits does away with that fixity and alters that which was guaranteed to be unalterable. The question whether the income or profits now made was then taken into account or the sources from which they are now made were in those days unknown or not in existence does not affect the matter, in view of the Preamble to Regulation II of 1819 and the Preamble as well as section 31, Cl. (2) of Regulation VIII of 1819.

The argument that it was only the revenue payable by the lands and not the entire demand of the State for all income or profits referable to the estates was fixed by the Permanent Settlement loses sight of the fact that income or profits from fisheries were taken into account. The object of the settlement in exempting from further burden income which had already paid toll to the State in the shape of land revenue was primarily to protect and improve agriculture, as that then was the chief source of income, and the exemption of agricultural income from the operation of the Income-tax Act perhaps indicates a continuity of policy on the part of the Legislature in that respect. This to my mind is the inwardness of the doubt expressed by the learned Judges who constituted the Full Bench in the case of *The Chief Commissioner of Income-tax, Madras v. Zemindar of Singampatti* (1), as to the meaning of "Agricultural income." The words of the Settlement, however, are clear enough as indicating an intention to leave untouched, for all times to come, the surplus that the landholder will be able to derive as income or profits from the lands of his estate.

It may not, perhaps, be right as a matter or method of construction in order to construe the Income-tax Act, XI of 1922, to put it side by side with Regulation I of 1793 without taking into account the events that have happened during and the changes that have been wrought by the long years

(1) 1 I. T. C. 181.

that separate the two enactments, but such a comparison is not altogether without its purpose. If the income-tax was sought to be levied upon permanent settlement zemindars while Regulation I of 1793 was yet in sight, would it not have been understood as having taken away from the fixity of the State demand and altered the income and profits the unalterable character of which the Regulation had assured?

The above, in my opinion, is the relation between the two enactments, but we are yet on the threshold of the enquiry. It is not disputed that the Legislature has absolute right to abrogate, modify or destroy any right or privilege, even if it be of its own creation. What we have then to consider is whether the Legislature has done so, expressly or by necessary implication, in this particular case.

As a guide to the construction of this Act, to argue on the basis of other Acts, *e.g.*, the Zemindari Dak Cess Act, the Road Cess Acts, the Public Works Cess Act, the Embankments Act, the Drainage Act, the Bengal Municipal Act, the Court of Wards Act, the Village Chaukidari Act, the Court Fees Act, the Stamp Act, the Bengal Settled Estates Act, the Probate Act and the like—enactments relating to what is said to be direct or indirect taxation—is, I say with all respect, to argue on the strength of a palpably false analogy, so long as the absolute privilege of the Legislature to which I have referred is not disputed. These legislations, most if not all of them, may be justified as imposing taxes in return for services rendered, facilities offered or benefits conferred. In some of them reference is made to “land” or the income or profits arising or derivable therefrom as affording a basis for calculating the amount of the imposition. In others the imposition is, no doubt, an additional burden on the lands, or viewed in another way forms a deduction from the income or profits of the lands, but the language that is used leaves no doubt as to the intention that the imposition should operate as such. If justly or unjustly these enactments have been passed and the intention to interfere with the zemindar’s income or profits from the lands permanently settled with him is clear, what help does it afford us in construing Act XI of 1922? In my opinion it is of very little consequence if the Legislature has put a different meaning on “the fixity of public demand” from what it obviously bears or chosen to violate the fixity more than half a century after, if it be established that it has done so.

A consideration of the earlier enactments relating to income-tax is, perhaps, more profitable. To turn then to the earlier enactments. In Act XXXII of 1860, section 1 provided that “there shall be collected and paid . . . for and in respect of the property and profits mentioned in the several schedules.” Schedule 1 ran in these words: “For and in respect of the property in and profits arising from all lands and houses in India.” Schedule 2 ran thus: “For and in respect of the annual profits arising to any person residing in India from any kind of property whatever, whether situate in India or elsewhere. . . .” The rules applicable to Schedule 1 are contained in Part VII and they expressly refer to lands permanently settled (*vide* Rules 1 and 4). This Act remained in force from the 1st of July, 1860, to the 1st of August, 1865. There can be no question that this Act referred to “All lands and houses in India”, “any kind of property. . . in India”, and the rules provided for computing the assessment on permanently-settled lands. The next important Act to which reference need be made is Act VIII of 1872. The Preamble says: “For the purpose of imposing duties on income arising from offices, property, professions or trade.” The mode of assessment is differently provided for as regards “Duties on offices” (Part II), “Duties on profits of companies,”

(Part III), "Duties on interest on Government Securities." (Part IV), while Part V deals with "All other income." Section 16 says: "A yearly duty of two pies for every rupee shall be levied upon *all incomes* of one thousand rupees per annum or upwards, not chargeable under Part II, Part III, or Part IV of this Act." Section 21 says: "Owners of lands or houses occupying the same shall be chargeable in respect of the annual value thereof at 9/10ths of the full rent at which such lands or houses are worth to be let for the year." Then follows a provision for making special rules for calculating the assessment, when the income is derived from land paying revenue. This Act made *all incomes* including those derived from lands assessable to tax, and there is no reason to suppose that it intended to exclude permanently-settled lands. This Act remained in force for one year only. To take Act II of 1886 next. In this Act a marked departure is noticeable, the Preamble states: "Whereas it is expedient to impose a tax on income derived from sources other than agriculture." The charging section is section 4. The exceptions are mentioned in section 5 in which "land" is mentioned by way of exception, and it points to the sources of income as specified in the first column of the Second Schedule. This Schedule is divided into four parts. Part I relates to salaries and pensions, Part II, profits of companies, Part III, interest on securities, and Part IV, other sources of income. This last is stated to be "any source of income not included in Part I, Part II or Part III of the schedule." The provisions of the Act relating to mode of assessment and collection say nothing as to revenue whether temporarily or permanently settled. The word "lands" does not come in at all as a source of income, unless it comes under "Any source" in Part IV. The language of Act VII of 1918 need not be separately considered, as it is repeated with but slight alteration in Act XI of 1922. The structure of this Act again is radically different from the Acts of 1860 and 1872 and there are also points of difference between it and the Act of 1886. The Preamble is neutral. It states: "Whereas it is expedient to consolidate and amend the law relating to income-tax and super-tax," and the schedule of enactments repealed refers to the Act of 1918, and the amending Acts of 1919 and 1920. "Total income" is defined in section 2 (15) as meaning total amount of income, profits and gains from all sources to which the Act applies, computed in the manner laid down in section 16. If one looks for the sources to which the Act applies, one finds a negative in the eight classes of income specified in section 4, sub-section (3), as being the income to which the Act does not apply. The affirmative is found in the charging section which is section 4. That section says: "Save as hereinafter provided, this Act shall apply to all income, profits or gains, as described or comprised in section 6, from whatever source derived, accruing, arising or received in British India or deemed under the provisions of this Act to accrue or arise or to be received in British India." The section, therefore, refers only to section 6 which, instead of definitely exhausting all the sources of income, merely says: "Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing: (i) salaries; (ii) interest on securities; (iii) property; (iv) business; (v) professional earnings; and (vi) other sources." Ordinarily, one should have expected profits from lands to come under the head of 'Property' but section 9 which provides for the mode of assessment of property clearly limits it to buildings or lands appurtenant thereto. Income or profit from lands, permanently or temporarily settled, therefore must come, if at all, under the head of "Other sources." Why then should not "Other sources" include only those sources as are taxable; and why should the expression be taken as comprising the income or

profits of all lands irrespective of whether they are taxable or not? The policy of the shortlived measures of 1860 and 1872 need not necessarily have been continued in 1886, and for the matter of that there is nothing to indicate a continuity of policy from even 1886 to 1922. We are not permitted to speculate as regards the policy or the intention of the Legislature. What we find for certain is that the Act of 1922 does not make *all persons* taxable, nor *all lands* taxable, nor *all income* taxable, nor again *all sources* or *all other sources* taxable.

To this view two objections are possible : One is the difficulty created by the definition of "Agricultural income" as contained in section 2, subsection (1), which includes such income from permanently as well as non-permanently-settled estates. This difficulty, however, is more apparent than real, because if income or profits from permanently-settled estates were meant to be kept outside the purview of the Act the definition will cover only such land as is assessed to land revenue and is not permanently settled. The other difficulty is as regards income from lakheraj or revenue-free lands. But is this a difficulty? A review of the law relating to lakheraj grants, of which the foundation is Regulation XIX of 1793, is to be found in the case of *Hurryhur Mukherjee v. Madhab Chandra Babu* (1). If these lands have been exempted from revenue for ever the Act will not apply to them, that is all. There is no equity about the tax and no equitable consideration can come in on the question of construction of a taxing statute.

Canons of construction laid down in authoritative decisions to which our attention has been drawn are very difficult of application in particular cases; they depend upon so many considerations; but it is just as well to refer to some of them here.

One of the cases upon which reliance has been placed on behalf of the assessee is *Associated Newspapers, Limited, and others v. Corporation of the City of London* (2). In that case what happened was this: Section 51 of 7 Geo. III, c. 37, vested the lands reclaimed from the river Thames under the provisions of the statute in the owners of the adjoining lands and wharves, *free from all taxes and assessments whatsoever*. Section 169 of the City of London Sewers Act, 1848, enacted that every sewer rate and consolidated rate should be levied upon every occupier of any house or building in the city "whether such persons shall be now liable in respect of such house or building to be assessed to the relief of the poor or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra parochial place or otherwise." The House of Lords held that the exemption granted by 7 Geo. III, c. 37, though limited by the context to local as distinguished from Imperial taxes, extended to all local taxes and assessments, whether present or future, except so far as any Act imposing a new tax qualified or repealed the exemption. It was held that the words "free from all taxes and assessments whatsoever" were not repealed by the words of the Act of 1848. It was observed that in *London Corporation v. Netherlands Steamboat Co.* (3) the same statute was construed as not repealing the exemption contained in some statutes of 1812 and 1813. It was thus held that it is competent to the Legislature to withdraw or modify such an exemption by a subsequent enactment, but that it could only be done expressly and not in general terms or by implication. The cases of *Kutner v. Phillips* (4) *Thorpe v. Adams*, (5) *Attorney-General v.*

(1) (1871) 14 M. I. A. 152. (2) (1916) 2 A. C. 429. (3) (1906) A. C. 263
(4) (1891) 2 K. B. 187. (5) (1871) L. R. 6 C. P. 125.

Horner (1), *Barker v. Edger* (2), have been cited in support of the maxim *Generalia Specialibus non derogant* and as illustrative of the principle that a repeal by implication is only effected when the provisions of the later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, in which case the maxim *Leges posteriores Contrarias abrogant* applies, and unless the two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Reference has been made to *In Re-Smith's Estate: Clements v. Ward*, (3) and *Fitzgerald v. Champneys* (4), in the latter of which cases Sir W. Page Wood, V. C., observed: "In passing the special Act the Legislatures had their attention directed to the special case which the Act was meant to meet and considered and provided all the circumstances of that special case: and having done so, they are not to be considered by a general enactment passed subsequently, and making no mention of any such intention, to have intended to derogate from that which by their own special Act they had thus supervised and regulated." The words of Lord Coke in *Foster's case* (5), have been referred to: "It must be known that for as much as Acts of Parliament are established with such gravity, wisdom and consent of the whole realm, for the advancement of the Commonwealth they ought not, by any constrained construction out of the general and ambiguous words of a subsequent Act, to be abrogated." There are two other cases upon which the assessee specially relies. One is *Garnett v. Bradley* (6), in which Lord Blackburn said: "There is another rule which has been laid down, which I think is a good rule if it is properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law, standing as an exceptional proviso under the general law." The other case is *Pole Carew v. Craddock*, (7). In this case a ferry was established by and maintained under an Act of 1790 (30 Geo. III, c. 61) which was deemed to be a public Act and contained a provision that the then proprietors or their respective heirs or assigns "shall not be rated or assessed for or toward the payment of any tax, rate or assessment whatsoever, Parliamentary or parochial, for or in respect of the said ferry." It was held that the principle of *Associated Newspapers, Limited, and others v. City of London*, (8) applied to Imperial taxes and that the exemption granted by the statute extended to Parliamentary taxes whether in existence at the date of the Act or not, and therefore included income-tax, although that tax was first imposed subsequently to the passing of the Act of 1790.

On behalf of the Crown the most important of the cases cited is *Nova Scotia Steel and Coal Co., Ltd. v. Minister of Finance and Customs* (9). In this case, under an agreement with the Government confirmed by a statute of 1910, the Company paid a tax on each ton of ore exported by them and were exempt from paying any further charge or tax "upon or in respect of the said ore." By the Business Profits Act, 1917, an annual tax was imposed on the net profits of businesses. On the question of exemption by reason of the agreement of 1910, it was held that the tax upon the profits was not a tax

(1) L. R. 14 Q. B. D. 246 (2) (1898) A. C. 748. (3) L. R. 35 Ch. D. 389.
 (4) 2 J & H. 31. (5) (1615) 11 Co. Rep. 54 b. (6) L. R. 8 App. Cas. 944.
 (7) (1920) 3 K. B. 109. (8) (1916) 2 A. C. 429. (9) (1922) 2 A. C. 176.

upon or in respect of the ore exported. It was pointed out that in general a tax on profits and an export tax on commodities are different impots, financially and economically, and cannot be identified even by the indefinite expression "in respect of." *Mersey Docks v. Cameron; Jones v. Mersey Docks*, (1) has been referred, but there is hardly any room for the application of that principle here. The case of *Attorney-General v. Exeter Corporation* (2), has also been referred to, but Hamilton, J. while referring to *Foster's* case and other cases in support of the maxim *Generalia specialibus non derogant* held that the maxim was inapplicable to the case before him.

On a consideration of the authorities referred to above, the conclusion I have come to is that there is a clear distinction between *Nova Scotia Steel and Coal Co., Ltd. v. Minister of Finance and Customs* (3), and the case here. The immunity in that case extended only up to the exportation of the ore and by the general words "in respect of" could not extend further, that is to say, to such profits as would be derived by business on it. This is pointed out in the decision itself. In the present case all income or profits that the zemindar derived from his permanently-settled estate was exempted from further taxation as such income or profits for ever. The two enactments, in my judgment, are not necessarily inconsistent or repugnant to each other, and in the words of Lord Blackburn I venture to think that the Permanent Settlement Regulation I of 1793 may very well stand as an exceptional proviso under the Income-tax Act, XI of 1922.

The effect of this conclusion, it has been pointed out, will have far-reaching consequences, as it will follow that royalty on mineral in permanently-settled tracts will not be taxable. I am not so sure that this will necessarily follow: the royalty may be viewed in quite a different light and in any case the zemindar's right to the minerals under the permanent settlement has yet to be authoritatively decided [see *Secretary of State v. Raja Jyoti Prasad Singh*, (4)].

There is a further consideration which has weighed with me in arriving at the opinion that I have formed. The case of the *Chief Commissioner of Income-tax, Madras v. Zemindar of Singampatti*, (5) was decided by a Full Bench of the Madras High Court so far back as February, 1922. I do not think it makes any difference that there was a sanad in that case as the sanad did not profess to go beyond the Regulation, viz., XXV of 1802. The law so far as that Presidency is concerned must be taken to have been settled then. In January, 1924, the law so far as the province of Bihar and Orissa is concerned was settled much in the same way. The Income-tax Act which is an all-India enactment has been amended so recently as in 1926 (Act XXIV of 1926) and yet no attempt has been made to get rid of those decisions. It is said that a provision for an appeal has now been made; but does that meet the point? It is hardly reasonable to suppose that a fiscal enactment has been left neglected in that way.

For the reasons given above, I regret I am unable to share in the view taken by my learned brother C. C. Ghose, J. I would, though not without a good deal of hesitation, answer question III in the negative in respect of all the ten items which, in my opinion, are income or profits derivable from or referable to the lands. In view of this answer to question III, question II does not arise.

One word more I desire to add. The Income-tax Act, like other statutes, must be read according to the ordinary and natural construction of the words,

(1) (1865) 11 H. L. C. 443 at p. 480.
(3) (1922) A. C. 176.

(4) 53 I. A. 100.

(2) (1911) 80 L. J. (K. B.) 636.
(5) 1 I. T. C. 181.

with only such aid as is afforded from within the four corners of the statute itself read as a whole, and my conclusions are based on the statute itself, though to test their correctness, I have been guilty of digression somewhat unpardonable.

BY THE COURT.—The Reference to the Full Bench is, therefore, disposed of in accordance with the opinion of the majority of the Court. No order is made as to the costs of this Reference.

JUDGMENT OF THE DIVISION BENCH.

(Rankin, C. J. and Majumdar, J.)

MAJUMDAR, J.—In the present reference the learned Vakil who appears for the assessee confines himself to three items included in the first question, namely, item (v), item (vii) and item (viii).

With reference to item (v), namely, fees received from land used for storing purchases of crops (*paiali*), what is actually meant by this is given in the petition of the assessee which he presented to the Assistant Commissioner of Income-tax at Goalpara. He means the income which is derived for the use of land for storing purchases of food crops, etc. by merchants. Evidently this does not come within the definition of "agricultural income" as given in section 2 of the Indian Income-tax Act. The income so derived is not derived from land used for agricultural purposes and, as such, such income cannot be claimed to be exempt from assessment.

With reference to item (vii), i.e. *punyaha nazar* or *nazar* paid by tenants of agricultural holdings at the beginning of the Zamindari year, I am of opinion that this also does not come within the definition of "agricultural income" as given in the Act. This *nazar* is generally paid by tenants who are actually present on the occasion of the *punyaha* to the landlord. There is no uniformity in the payment of such *nazar*, nor is there any compulsory method for realising such *nazar*. The tenants, if they choose, might not pay any *nazar* whatsoever on that occasion and the landlord cannot under any law at present in force enforce his supposed right, nor can the landlord demand *nazar* at a certain uniform rate. It is purely a voluntary payment by tenants who take part in the ceremony and who usually are present on the occasion. It is not, therefore, an income which is derived from land used for agricultural purposes.

The learned vakil draws our attention to the Full Bench case of *Meher Bano Khanum v. Commissioner of Income tax, Bengal*, (1) and particularly to a passage in the judgment delivered by Mr. Justice Greaves where the learned Judge says, referring to the *salami* paid to a landlord for recognition of the transfer of a non-transferable holding, that "it is money which comes to the landlord by virtue of the fact that he is the owner of the land" and that that being so it would be an agricultural income and so exempt from the operation of the income-tax.

Now, in the Full Bench case the reference was in connection with *nazar* paid by a tenant for recognition of transfer of a non-transferable occupancy holding. With reference to such a holding the position stands thus in law, that when such a transfer takes place the landlord is not bound to recognise such a transfer and that in case the landlord does not recognise such a transfer, the landlord is free to take *khas* possession of the holding. When he does recognise such a transfer, that practically amounts to a sort of new settlement with the transferee and the *nazar* which is actually paid on the transfer by the transferee really amounts to the capitalized value of a part

of the rent. Under such circumstances, such *nazar* would be an income derived from land, and, as such, would come within the definition of "agricultural income". Though this fact was not referred to prominently in the judgment, still the effect of such a transfer and of such a recognition amounts in law to a sort of new settlement by the landlord with the transferee. That being so, the case covered by the Full Bench altogether stands on a different basis from the present case and can hardly be used in support of the argument advanced by the learned vakil in connection with *punyaha nazar*.

Then, with reference to item (viii), i.e. *nazar* paid for petition presented to zamindar dealing with questions of succession, settlement and partition, this stands on a worse ground. This has absolutely nothing to do whatsoever with lands used for agricultural purposes unless in a most indirect and remote way. The landlord is not entitled to exact from a tenant *nazar* for such petitions, nor is a tenant liable to pay it under any provision of law. When the question of succession opens up with regard to a holding no such petition is necessary under the law. If the holding be an occupancy holding the landlord is bound to recognise the succession, petition or no petition. It is only in certain cases that certain steps have got to be taken in connection with succession of tenures, and those have been provided for in the Bengal Tenancy Act. But that has got nothing whatsoever to do with the *nazar* which is referred to in item (viii).

Then, the item (viii) refers to *nazar* for petitions dealing with questions of succession, settlement and partition. It is not "*nazar* paid for recognition of succession or partition or for settlement". Certainly the landlord may be entitled to something for recognising succession or partition or for settlement. That would be an income derived from land. In cases of partition the landlord may rightfully demand certain fees. In cases of holdings and tenures if the tenants choose to partition the same, they can do it with the consent of the landlord, and the consent of the landlord may have to be purchased and in those cases the fee which the landlord would get may come under the definition of "agricultural income" as given in the Act. But in this reference we are concerned with the *nazar* for petitions dealing with the question of succession, etc., and not with *nazar* paid to the landlord referred to above, for obtaining the recognition of the landlord in matters of succession or partition or for settlement. Such being the case such *nazar* for petitions would not come within the definition of "agricultural income" as given in the Act. So, this item would also be assessable to income-tax and would not be exempt from the operation of the Income-tax Act.

RANKIN, C.J.—I agree entirely in the judgment which has been delivered.

With reference to the first question put by the Commissioner of Income-tax the answers to all the items are in the negative. The answer is in the negative with reference to items (v), (vii) and (viii) for the reasons which have been given by my learned brother and with which I entirely agree.

We make no orders as to costs.

The judgments now given together with the judgments given by the Full Bench on the second and third questions (if those have not already been sent to the Commissioner) will be forwarded to him under the seal of the court and the signature of the Registrar as provided by section 66 of this Act (XI of 1922).

[195] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Justice Sir Cecil Walsh, Kt., K. C. and Mr. Justice Banerji.

[9th May, 1927.]

Shib Lal Ganga Ram

.. Assessee.*

v.

The Commissioner of Income-tax, United Provinces .. Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (1) and 4 (3)—Lands worked as quarries—Assessment of quarry profits to income-tax—Profits taken into account in land revenue assessment—If exempt from income-tax assessment—If agricultural income.

The assessee, owner and occupier of certain cultivable but not cultivated lands containing valuable stone quarries, was paying land revenue to Government assessed upon the basis of the rental value arrived at by taking into account the profits derived from the working of the quarries. On an assessment to income-tax of the quarry profits, the assessee claimed that as he was paying land revenue based upon those profits, he was exempt from assessment to income-tax in respect of those profits.

Held, that the ground of exemption claimed by the assessee not being recognised by the Income-tax Act, the profits from the quarries which could not be said to be agricultural income were not exempt from assessment to income-tax.

Case [Miscellaneous Case No. 415 of 1927] stated under section 66 of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, for the opinion of the High Court.

CASE.

Messrs. Shib Lal Ganga Ram of Agra were assessed to income-tax by the Income-tax Officer, Agra, on December 7, 1926, the sources of income being "property" and "business". A part of the profits assessed under the latter head was derived from certain stone quarries situated in Tantpore in the Agra District.

2. Some of the quarries were in existence in 1879, when the last settlement of the land revenue of Tantpore was made, and a sum of Rs. 213 was added on account of the income from the quarries by the Settlement Officer when he calculated the assets of the *mahal* (*vide* copy of settlement note enclosed—Appendix I). The income from the quarries in the village is now many times larger than in the days when the settlement was made.

3. The *mahal* is temporarily settled as shown by the copy of a translation of the settlement engagement enclosed (Appendix II).

4. At the time of assessment of income-tax the assessee claimed that the income from the quarries was agricultural income as it had been assessed to land revenue, but the claim was rejected by the Income-tax Officer. An appeal was rejected by the Assistant Commissioner of Income-tax who remarked that, although as a fact land revenue was assessed on the quarries, the income from the latter could, by no stretch of imagination, be considered to be income from land used for agricultural purposes.

5. The assessee has now demanded a reference to the High Court on the grounds :

(1) "Because it is found by the Assistant Commissioner of Income-tax that Tantpore quarries are assessed to land revenue in British India;

(2) because as such their income ceases to be liable to income-tax as being 'agricultural income' under section 2 (1) (a) of the Income-tax Act;

(3) because the interpretation of the definition of 'agricultural income,' arrived at by the Assistant Commissioner of Income-tax in the present case, is wrong". (*Vide* copy of the petition attached—Appendix III †)

* (1928) I.L.R. 50 All. 98; 25 A.L.J. 816; A.I.R. (1927) All. 703.

† Not printed.

6. The question of law which arises, and which is stated for the decision of the High Court is :—In a temporarily settled *mahal* are the profits derived from quarries agricultural income within the meaning of section 2 (1) (a) of the Indian Income-tax Act, 1922, when the income derived from the quarries in the *mahal* at the time of the settlement was assessed to land revenue?

7. In the opinion of the Commissioner of Income-tax the answer is in the negative for the reason that under section (2) (1) (a) of the Indian Income-tax Act, 1922, not only must land revenue be assessed, but the land must be used for agricultural purposes.

APPENDIX I.

Extract from the Settlement Officer's note.

The real income of the village is, indeed, derived from the stone quarries which yield very large quantities of excellent stone; large areas of cultivated land have been gradually absorbed by the extension of the quarries which are dotted about the area between Kakarsna and Tantpore and again southwest of Tantpore in the hills. The average income, as shown in the papers from the quarries, is about Rs. 200; but this is probably below the mark certainly of late years since there has been a demand for the railway work. The corrected rental of the lands is Rs. 900. Pargana rates would give Rs. 1,495, but as shown above pargana rates are much too high for such inferior lands. I rate as shown in Schedule XII and calculate the rental at Rs. 1,157. Adding for the income from the quarries I estimate the annual assets at Rs. 1,380.

APPENDIX II.

Translation of Agreement in Form No. 27-a (settlement of 1879)

"We, Nandan Singh and Hira Singh, Lambardars of *mahal* Ghaskata, *pargana* Kheragarh, agree to pay a revenue of Rs. 700 on condition of Government sanction for 30 years, commencing from 1287 *Fasli*, or for a period which the Government may sanction and thereafter till the next settlement is made. We admit that after this if any mine is discovered the Government has full rights in it, and that if any grove of trees now standing, or any part thereof, is cut down or decays and is not immediately replaced, the land on which the trees stood (if it was excluded from assessment of revenue) shall be assessed and the revenue fixed thereon shall be added to the revenue we agree to pay."

N. P. Asthana, for the assessee.

U. S. Bajpai, for the Crown.

JUDGMENT.

We have no doubt as to what the answer to this question must be. The assessee is the owner and occupier of certain land in the Agra District which contains valuable stone quarries. These he has been working at a profit for a very considerable time. In 1879 when the land in question was assessed for revenue purposes, the extract from the Settlement Officer's note, which forms part of this case, shows that the revenue was assessed against the then owner, upon the basis of the rental value, arrived at by taking into account the profits which he was making from the working of the quarries. That would be quite correct if the problem to be solved was the rental value of the land. It was not cultivated land although it had been cultivated. The Settlement Officer says:—"Large areas of cultivated land have been gradually absorbed by the quarries". Taking into account the average income from the quarries, and adding it to the supposed rental value of the rest of the land, he arrived at an annual figure of Rs. 1,380. He does not profess to have arrived at a really accurate figure. Indeed he says that the figures are below the mark, and that in later years the profits have very much increased. But whether

the assessee has been paying too much or too little, there is no doubt that from 1879 he has been paying in the shape of revenue a contribution to the public funds, based upon the profits made from the quarries. The question is whether that relieves him from the undoubted statutory duty of making a return of the profits which he makes from the quarries and of being assessed thereon for the purpose of income-tax.

As to his *prima facie* liability to pay income-tax upon the profits of the quarries, there can be no doubt. Section 4 provides for that in the plainest terms. Certain exemptions from liability to income-tax are provided in section 4, and of these the only one material to this case is agricultural income. Therefore, we have to see whether the assessee can bring himself within the exemption. Agricultural income means rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue or subject to a local rent collected by a Corporation. Nobody can seriously contend that profits from the working of quarries and the sale of stone is agricultural income within the meaning of that definition, or that the quarries themselves are land used for agricultural purposes. The assessee, therefore, fails to bring himself within the exemption. His real complaint, of course, is that in being assessed for income-tax upon the profits derived from the quarries, he is paying to some extent twice over, but in order to obtain exemption from liability under the Income-tax Act he would have to show that there was some provision in the Act which exempted profits which had been either taxed or taken into account in assessing revenue for some other State purposes. There is no such provision in the Act.

The Income-tax Act is of a much later date than the settlement in question, and, no doubt, the contingency which has occurred in this case, namely, of an assessee paying already to some extent tax in respect of profits arising from his business, by reason of the fact that they had been taken into account in assessing revenue by Revenue Authorities was overlooked. This, however, is no concern of the Income-tax authorities, who have only to administer the Act as they find it. Whether, in view of the fact that a later Act has imposed a revenue tax upon the profits of the quarries, which the Revenue Authorities have already taken into account in assessing rental value for another purpose, affects the question between the Revenue Authorities and the present assessee in respect of his liability to pay revenue is a question which we cannot decide. We merely content ourselves with saying that unless there is some provision in the revenue law which makes it clear that a double tax is intended to be made in respect of such sources of profit, the assessee appears to have a strong ground for applying to the Revenue Authorities for re-consideration of the rental value, on the ground that part of the land in respect of which he has been assessed for revenue, has been assessed on the basis of the profits he is making from the working of the quarries, because the result of this decision will be, unless some amelioration is provided by the Revenue Authorities, that he will have to pay in respect of those profits twice over.

The answer to the question which is contained in para. 6 of the stated case is "No".

Under the circumstances we think that both parties ought to pay their own costs, and we assess the fee of the Government Advocate at Rs. 100. Any amount deposited by the assessee will be returned to him.

[196] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Justice Sir C. C. Ghose, Kt. and Mr. Justice Cammiade.

[15th June, 1927.]

Lal Mohan (Saha) Poddar

.. *Accused-Petitioner.**

v.

King-Emperor

.. *Opposite Party.*

Income-tax Act (XI of 1922), Sec. 37 and Penal Code (XLV of 1860), Sec. 196—Production of account books before Income-tax Officer—Accounts found false—Proceedings, if judicial proceedings—Prosecution for offence under Sec. 196, I. P. C.—Legality.

In compliance with a notice issued under Sec. 23 (2) of I.T. Act the assessee produced certain account books and attended before the Income-tax Officer for explaining them. After investigation the Income-tax Officer found the account books to be false, whereupon the assessee was prosecuted and convicted for an offence under Sec. 196, Indian Penal Code.

Held, that the proceedings before the Income-tax Officer on the production of the accounts books were not judicial proceedings, Sec. 37 of the Income-tax Act deeming such proceedings to be judicial proceedings, not referring to Sec. 196, I. P. C.

Criminal Revision No. 324 of 1927 against an order of the Deputy Magistrate, Dacca, dated the 11th February, 1927.

Provas Chandra Mitter, Bhagirath Chandra Das and Suresh Chandra Taluqdar, for the petitioner.

Khundkar, for the Crown.

JUDGMENT.

This rule must be made absolute and for the following reasons. It appears that the petitioner before us is a member of a family who carry on an ancestral business in the District of Dacca as cloth merchants and money-lenders. The firm in question were asked by the Income-tax authorities to submit a return of their income for purposes of assessment of income-tax. A return was filed, but thereafter a notice was served on the firm under the provisions of section 23 (2), Indian Income-tax Act, 1922, requiring the production of certain account books for the 1329 and 1330 B.S. The petitioner before us as stated above is a member of the firm but he is also a legal practitioner at Narainganji. It appears that the petitioner on two days, namely, the 8th September, 1925 and the 25th November, 1925, produced certain books belonging to the firm in question before the Additional Income-tax Officer. It is said that he attended before the Additional Income-tax Officer for the purpose of explaining the accounts contained in the said books to the Additional Income-tax Officer: It was found, however, in the course of further investigation by the Income-tax authorities that the books in question were false account books and had been prepared for the purposes of the assessment of income-tax. Thereafter the petitioner along with another person was prosecuted for having committed an offence punishable under section 196, Indian Penal Code. He was convicted and sentenced to pay a fine of Rs. 500 and to be detained in Court till the rising. The petitioner thereafter moved this Court and obtained the present rule.

On behalf of the petitioner Sir Provas Mitter has argued that the petitioner could not be convicted under section 196, Indian Penal Code, having regard to the provisions of section 37, Indian Income-tax Act. Section 37 of the Act runs as follows :

“ The Income-tax Officer, Assistant Commissioner and Commissioner shall, for the purposes of this chapter, have the same powers as are vested in a court under the Civil Procedure Code, 1908, when trying a suit in respect of the following matters, namely, (a) enforcing the attendance of any person and examining

* (1927) 31 C. W. N. 996; 46 C. L. J. 550; A. I. R. (1927) Cal. 724; 104 Ind. Cas. 903.

him on oath or affirmation, (b) compelling the production of documents, and (c) issuing commission for examination of witnesses, and any proceeding before an Income-tax Officer, Assistant Commissioner or Commissioner under this chapter shall be deemed to be a 'judicial proceeding' within the meaning of sections 193 and 228, Indian Penal Code."

It would appear from what is contained in section 37, Indian Income-tax Act, that any proceeding before an Income-tax Officer, Assistant Commissioner or Commissioner under the chapter in which section 37 finds place (it may be noted that a proceeding pursuant to a notice under section 23 (2) is a proceeding under the said chapter) would be deemed to be a "judicial proceeding" for the purpose of sustaining convictions under sections 193 and 228, Indian Penal Code. As we read section 37, it seems to us to be clear that the legislature has, for the purpose of punishing offences under sections 193 and 228, Indian Penal Code (and under no others) converted proceedings before the Officers mentioned therein which are not judicial proceedings, ordinarily, into "judicial proceedings". Section 37, being a penal section, has to be construed strictly, and as will be seen from what is stated above there is no reference whatsoever in the section itself to section 196, Indian Penal Code. Therefore having regard to the terms of section 37, it cannot be said that the proceedings which took place before the Additional Income-tax Officer on the production of the account books on the two dates referred to above were "judicial proceedings". If that is so, having regard to section 37, there is no room whatsoever in it for attracting into it the provisions of section 196, Indian Penal Code.

The result, therefore, is that the conviction and sentence of the petitioner under section 196, Indian Penal Code, must be set aside and the fine, if paid, will be refunded.

[197] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Broadway, Ag. Chief Justice and Mr. Justice Bhide.

[22nd June, 1927.]

Nathu Mal

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab and N. W. F. Province.

Income-tax Act (XI of 1922), Secs. 25 (3) and 66 (3)—Hindu joint family, disruption of—Business carried on by joint family allotted to one member on partition—Claim for assessment under Sec. 25 (3)—Question, if one of law.

The question of the legal effect of the disruption of a Hindu joint family on the right of a member thereof to claim the benefit of an assessment under Sec. 25 (3) of the Income-tax Act in respect of a business originally carried on by the joint family and allotted to him as his share in the partition is one of law in respect of which the Court will direct the Commissioner to state a case under Sec. 66 (3).

Application [Miscellaneous Petition No. 765 of 1926] under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Punjab, to state a case for the opinion of the Court.

Mehr Chand Mahajan, for the assessee.

Jagan Nath Aggarwal, for the Crown.

JUDGMENT.

It appears that one Nathu Mal and his six sons constituted an undivided Hindu family carrying on business at Amritsar, one of their firms being styled Kalu Mal Shori Mal. This family business had been assessed income-tax as

*A.I.B. (1927) Lah. 616; 103 Ind. Cas. 522.

one concern. On the 18th April, 1923, the family as a joint family came to an end partition having been effected, and it appears that the business carried on under the name of Kalu Mal Shori Mal fell to the share of Nathu Mal. Nathu Mal accordingly moved the Income-tax authorities for a consideration of the assessment, alleging that he was entitled to the benefit of section 25 (3) of the Income-tax Act. The matter came up before the Income-tax Commissioner ultimately, on an application filed under section 66 (2), Income-tax Act, in which Nathu Mal asked for a review of the Income-tax Commissioner's order, or in the alternative a reference to this Court. The Income-tax Commissioner on the 28th May, 1926, declined to refer the matter to this Court on the ground that the question as to the disruption of the family was one of fact and not of law. It appears, however, that he has held that there has been a disruption of the family and the family business. The legal effect of the disruption is, in my judgment, a question of law, and I would, therefore, accept this petition and I direct the Income-tax Commissioner to refer that question to this Court for decision. Costs will follow the event.

[198] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Mr. Justice Broadway, Ag. Chief Justice and Mr. Justice Bhide.

[24th June, 1927.]

Messrs. Mohamad Farid-Mohamad Shafi

... *Assessee*s.*

v.

The Commissioner of Income-tax, Punjab

... *Referring Officer*.

Income-tax Act (XI of 1922), Secs. 33, 61 (1) (2) and (3)—Enhanced assessment by Commissioner acting under Sec. 33—Application by assessee for reference—If maintainable—Lahore High Court—Jurisdiction to issue Mandamus—Specific Relief Act (I of 1877), Sec. 45.

Where the Commissioner of Income-tax acting *suo motu* under Sec. 33 of the Income-tax Act enhanced an assessment by including therein certain sums of money exempted from assessment by the Income-tax Officer and the assessee thereupon applied under Sec. 66 of the Act for an order directing the Commissioner to refer the assessability of the disallowed items for the decision of the Court,

Held, that the Commissioner's order not being one under Sec. 31 or 32 of the Act, the Lahore High Court had no jurisdiction either under Sec. 45 of the Specific Relief Act or Sec. 66 of the Income-tax Act to direct the Commissioner to state the case.

Sheik Abdul Kadir Marakayar & Co. v. Commissioner of Income-tax, Madras, 2 I.T.C. 155, *S. Sinha v. Commissioner of Income-tax*, 1 I.T.C. 221 and *Alcock, Ashdown & Co. v. Chief Revenue Authority, Bombay*, 1 I.T.C. 406, considered.

Application [Civil Miscellaneous Case No. 131 of 1927] under section 66 of the Income-tax Act (XI of 1922) for a mandamus to issue to the Commissioner of Income-tax, Punjab and N. W. F. Province, directing him to refer certain points of law to the High Court.

Jai Gopal Sethi and Faqir Singh, for the assessee.

Jai Jagan Nath Aggarwal, for the Crown.

JUDGMENT.

BROADWAY, Ag. C.J. :—This is an application under section 66 of the Income-tax Act asking for a mandamus to issue to the Income-tax Commissioner, directing him to refer certain alleged points of law to this Court for opinion.

A preliminary objection has been taken by Mr. Jagan Nath Aggarwal for the Commissioner of Income-tax to the effect that the application is incompetent. The facts are briefly these. The firm of Messrs. Mohamad Farid

Mohamad Shafi was assessed income-tax for the year 1923-24 and again for the year 1924-25. The Income-tax Officer excluded from assessment in both years certain large sums of money which the assessee claimed a rebate on as being rental of the factory and premises on which the business was carried on. The assessee accepted this rebate but preferred an appeal to the Assistant Commissioner against certain other matters in which they were unsuccessful. They then remained content with the position of affairs. In August, 1926, however the Commissioner of Income-tax acting *suo motu* sent for the record of the proceedings and after giving notice to the assessee and hearing what they had to say included a sum of Rs. 40,500, which had been exempted from assessment, in the assessable income and called upon the assessee to pay a further sum of Rs. 6,414-8-0. The Commissioner of Income-tax was asked to refer the question as to whether this sum was liable to assessment, to this Court but refused to do so.

Now the learned counsel appearing for the assessee has admitted that this application does not fall within the purview of the second clause to section 66, inasmuch as the order passed by the Income-tax Commissioner was not passed either under section 31 or section 32 of the Act. He contends, however, that this Court has power to direct the submission of a point of law under the first clause of section 66. This is to the following effect :—

“ If, in the course of any assessment under this Act or any proceeding in connection therewith, etc., a question of law arises, the Commissioner may, either on his own motion or on reference from any Income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court.”

It will be seen that this clause refers to the reference of a question of law either by the Commissioner on his own motion, or on reference from any Income-tax authority subordinate to him. It does not contemplate a reference at the instance of an assessee. Mr. Sethi urged, however, that this Court has power to issue a mandamus directing the Income-tax Commissioner to do what the Act gives him a discretion to do and in support of his contention cited three authorities. The first of these was *Sheikh Abdul Qadir Marakayar & Co. v. Commissioner of Income-tax* (1)—an authority which certainly supports his contention. He next referred to *Sachchidananda Sinha v. Commissioner of Income-tax, Bihar and Orissa* (2)—an authority which also appears to support him. Finally reliance was placed on a decision of their Lordships of the Judicial Committee in *Alcock, Ashdown & Co., Ltd. v. Chief Revenue Authority of Bombay* (3).

Now the Madras and Bombay cases proceed on powers that those High Courts have under section 45 of the Specific Relief Act. Inasmuch as that section of the Specific Relief Act does not apply to this Court it is clear that those two authorities do not afford any assistance in the decision of the point before us. The Patna Case, however, would need consideration but for the fact that the correctness of the view in the authority cited has been doubted in *Trikamji Jiwan Das v. The Commissioner of Income-tax, Bihar and Orissa* (4). At page 409 of the report the learned Chief Justice says referring to the Privy Council case:

“ In the Bombay case which was a decision of their Lordships of the Privy Council section 45 of the Specific Relief Act which gives the three High Courts in the Presidency Towns power to make orders in the nature of mandamus requiring specific acts to be done or foreborne by persons holding a public office, was relied on, but that section does not confer the same powers upon this

(1) 2 I.T.C. 155.

(2) 1 I.T.C. 352.

(3) 1 I.T.C. 221.

(4) 1 I.T.C. 406.

High Court; and section 66 of the Income-tax Act, which differs in certain material respects from section 51 of the Act of 1918 which was in force when the case cited was decided gives the High Court no power over the Income-tax Commissioner except to the limited extent therein provided. The Court, however, by its order considered that it had jurisdiction and ordered the Commissioner to state a case which he has done and it is not competent to this Court now to question the validity of that order."

The correctness of the view was also raised in *Krishnabalabh Sahay v. His Excellency the Governor of Bihar and Orissa* (1) at page 630 where it was stated that "It was suggested by the learned vakil for the applicant that this High Court had inherited from the Calcutta High Court much of its inherent jurisdiction including a right to issue a mandamus. In the circumstances of the present application I am content to leave the matter there. When the occasion arises the question can perhaps be further discussed with advantage; but it is noticeable to observe that even by section 45 of the Specific Relief Act none of the High Courts therein mentioned can make any order binding on a Governor."

In these circumstances I must hold that this Court has no power under section 45 of the Specific Relief Act to issue the mandamus asked for. Section 66 (1) does not give that power and I know of no other enactment which would enable us to make the order prayed for. Incidentally, as urged by Mr. Jagan Nath, it would appear that the Legislature has intentionally altered the old section 51 by dividing it into two distinct parts, leaving it discretionary in the Commissioner of Income-tax to make reference in certain circumstances while making it compulsory for him to do so when circumstances arise within the scope of the second clause to section 66

It was next contended that the order passed by the Income-tax Commissioner was really one under section 31 or section 32 and that therefore section 66 (2) would apply. A reference to the proceedings as stated before us clearly shows that the order of the Commissioner was passed under section 33—an order which appears to me to have been within his jurisdiction. Whether the question involved was one which might well have been referred as urged by Mr. Sethi is a matter with which we are not now concerned.

The application is therefore dismissed. I leave the parties to bear their own costs.

BEHDE, J. :—I concur.

[199] IN THE HIGH COURT OF JUDICATURE AT LAHORE.
Before Mr. Justice Broadway and Mr. Justice Bhide.
[1st July, 1927.]

Rai Bahadur L. Panna Lal

.. Assessee.*

v.
The Commissioner of Income-tax, The Punjab and N. W. F. Provinces.

Income-tax Act (XI of 1922), Secs. 11, 23 and 66 (3)—Contract running over a number of years—Accounts for assessment year not separable—Assessment on a flat rate of profits—Assessee not informed of basis therefor—Validity of assessment, if a question of law for reference.

On an application under Sec. 66 (3) of the Income-tax Act, the High Court directed the Commissioner to state a case on the following question :

Whether in the case of a contract spread over a number of years when accounts for the year under assessment cannot be separated, the Income-tax Officer is legally justified in assessing profits at a flat rate without informing the assessee of the information or evidence on which the rate is based and without giving him any opportunity to produce evidence in rebuttal?

* A.I.R. (1927) Lah. 691; 104 Ind. Cas. 127.

(1) (1926) I.L.R. 5 Patna 595.

Application [Civil Miscellaneous Petition No. 604 of 1926] under section 66 (3) of the Income-tax Act (XI of 1922) for the issue of a mandamus to the Commissioner of Income-tax, Punjab and N. W. F. Province, to refer certain questions of law for the decision of the Court.

Sardha Ram, for the assessee.

Jagan Nath Aggarwal, for the Crown.

JUDGMENT.

BHIDE, J.—The petitioner R. B. Panna Lal, a contractor of Ambala, was assessed to income-tax for the year 1924-25 in respect of certain contracts which commenced in 1922 and were finished some time in 1924. The petitioner produced his accounts, but the accounts for the year 1923 (which was the accounting year for the purpose of the assessment for 1924-25) could not be separated. The Income-tax Officer also considered the accounts to be unreliable. He, therefore, “assumed profit at the standard rate of 10 per cent.” for the purposes of his assessment. An appeal was preferred to the Assistant Commissioner who had the accounts re-examined. The Assistant Commissioner also found that the accounts for the year 1923 could not be separated. The assessee showed receipts and expenditure amounting to Rs. 2,57,946 and Rs. 2,54,775 respectively, during the entire period of the contracts and a net profit of Rs. 3,171 only. The Assistant Commissioner, however, considered items of expenditure amounting to Rs. 31,864 to be of a suspicious character as they were not supported by any details in the assessee’s “books of original entry”. The assessee produced certain other books giving details in respect of some of the larger items, but these books were produced only at a late stage and after several adjournments. If the items amounting to Rs. 31,864 were excluded altogether the contracts would have shown a profit of 14 per cent. The Assistant Commissioner concluded as follows :—

“ In any case it is impossible to ascertain from the assessee’s accounts what the income has been for one year and I, therefore, agree with the Income-tax Officer that the only way of ascertaining it is to apply the usual rate of 10 per cent. on the total payments received.”

The petitioner then applied to the Commissioner of Income-tax for a review and, in the alternative, prayed that certain points of law may be referred to this Court under section 66 (2) of the Income-tax Act. The Commissioner held that the points raised were questions of fact and not of law and, therefore declined to make any reference. The petitioner has now applied under section 66 (3) of the Act for the issue of a mandamus to the Commissioner to refer the following alleged points of law to this Court for decision, viz., (1) whether the Assistant Commissioner was legally justified in assessing the petitioner’s profits at a standard rate of 10 per cent. on the advances received during the calendar year 1923 on the ground that the accounts for that year could not be separated; (2) whether the Assistant Commissioner has erred in law in holding items of expenditure amounting to Rs. 31,864 as inadmissible merely because no details were given in full in the cash book.

It will appear from the order of the Assistant Commissioner referred to above that the second point does not really arise at all. It is true that the Assistant Commissioner was inclined to consider items of expenditure aggregating to Rs. 31,864 as suspicious, but he did not base his decision to assess the profits at the standard rate of 10 per cent. on that ground. The decision was merely based on the ground that the accounts for the year 1923 could not be separated. So the only point which requires decision is No. 1 stated above. The Commissioner of Income-tax apparently treated this as a question of

accountancy and not of law. On behalf of the petitioner it is urged, on the other hand, that the question is one of law and not merely of accountancy. The following authorities were cited in support of the contentions: *In re, Bishnu Priya Chowdhurani* (1) and *M. Sankar Iyer v. Commissioner of Income-tax, Madras* (2). In the former case the assessee had declared that he had no *bastu* income, but his statement was disbelieved and his *bastu* income was assessed at Rs. 1,528-6-4, at the rate of $2\frac{1}{2}$ per cent. on the gross rental, without there being any evidence to show that the assessee had, as a matter of fact, derived any *bastu* income. It was held that when the assessee had declared that he had no *bastu* income at all, it was for the Income-tax Officers to prove that he had any such income, but not for him to prove the reverse. The question whether, in the absence of any reliable data as to the income of an assessee from a certain source, the Income-tax Officer is justified in making an assessment based on a formula which had been found in practice generally applicable was referred to the High Court, but no opinion was expressed on it as the other point was considered sufficient for disposal of the reference. In *Sankar Iyer v. Commissioner of Income-tax, Madras*, (2) the assessee's accounts were held to be unreliable and his income was assessed at a certain figure by the Income-tax Officer without any materials before him. On application by the assessee, the High Court directed the Commissioner to state a case for the determination of the following question:

“Whether in cases where the Income-tax Officer is not prepared to act on the accounts produced or the statement or evidence of the assessee, he can assess without any evidence on the record, or whether he is bound to inform the assessee as to how he proposes to assess him and the information on which he proposes to act and to call evidence so as to allow the assessee an opportunity of showing that such information or evidence is incorrect and ought not to be acted upon.

It will appear from the above that the facts in both the cases are distinguishable. In the present case the assessee does not allege that he derived no income at all from any contracts, nor does the assessment proceed definitely on the ground that the accounts were unreliable. The Assistant Commissioner adopted a standard rate for the assessment merely because no separate accounts were available for the accounting year. This was apparently due to the manner in which the accounts were kept. The Income-tax Officer has pointed out, for instance, that expenditure in respect of certain items for two years was lumped together (for example, motor hire, cartage, etc.) in a single item. As the assessee failed to produce correct and complete accounts for the accounting year, it seems to me that it was open to the Income-tax Officer to make an assessment to the best of his judgment: *vide* section 23 read with section 11, Income-tax Act.

The Assistant Commissioner, however, gives no reasons for adopting what he calls the “usual” rate of 10 per cent. for the purposes of the assessment, and it is not known how that rate was arrived at. The ruling in *Sankar Iyer v. Commissioner of Income-tax, Madras* (2), referred to above, seems to support the contention that the petitioner ought to have been given an opportunity of rebutting the evidence or information on which the rate was based. On behalf of the Commissioner of Income-tax the decision of this Court in *In re, Ishar Das Daram Chand* (4) was referred to in support of the assessment at a flat rate; but in that case the flat rate was apparently based upon a consideration of the dealings. In my view, the following point of law emerges for decision in the circumstances of this case. Whether in the case of a contract spread over a number of years when accounts for

the year under assessment cannot be separated, the Income-tax Officer is legally justified in assessing profits at a flat rate without informing the assessee of the information or evidence on which the rate is based and without giving him any opportunity to produce evidence in rebuttal?

I would, accordingly, accept the petition and direct the Commissioner of Income-tax to state the case and refer the above point of law to this Court for decision. Costs will follow the event.

BROADWAY, J.—I concur.

[200] IN THE COURT OF THE JUDICIAL COMMISSIONER,
NAGPUR.

Before Mr. Kinkhede, Additional Judicial Commissioner.

[15th July, 1927.]

Jambudas

Assessee.*

v.

The Commissioner of Income-tax, Central Provinces.

Income-tax Act (XI of 1922), Sec. 66 (3)—Commissioner's finding of concealment of income by assessee—Burden of proof wrongly applied—Soundness of finding, if a question of law—Presumption of good faith in favour of assessee.

Where the Commissioner of Income-tax did not approach the consideration of the question of the concealment of income by the assessee from the right point of view of burden of proof, namely, presumption of good faith in favour of entries in the assessee's accounts, the soundness or otherwise of the Commissioner's conclusion is a question of law on which the Court will direct the Commissioner to state a case.

Application [Miscellaneous Judicial Case No. 44-B of 1926] under section 66 (3) of the Income-tax Act (XI of 1922) for an order directing the Commissioner of Income-tax, Central Provinces, to state a case.

W. R. Puranik, for the assessee.

G. P. Dick, for the Crown.

JUDGMENT.

The question whether the applicant has been rightly found to have concealed his income from the Income-tax Department depends upon the decision of the question whether or not on the facts found the inference of concealment could be based. The proper legal effect of proved facts is a question of law, as held by their Lordships of the Privy Council in *Nafar Chandra Pal v. Shukur* (1). Moreover, the Income-tax Department must always bear in mind that the normal presumption is in favour of good faith and not of bad faith on the part of the assessee. The applicant was, therefore, entitled to ask the Crown to start with a presumption that the entry in the Ravana Khata, Akola was made in the ordinary course and with no intention to conceal the income, and that it was for the Crown to prove the contrary. Suffice it to say at this stage that as the learned Commissioner does not seem to have approached the case from the right point of view of burden of proof, there is likelihood of the conclusions drawn by him being vitiated for want of proper appreciation of facts, or for misapplication of the law to them. This Court can always test the soundness in point of law of the conclusions drawn from proved facts. I am satisfied that the case involved questions of law on which the Commissioner could be compelled to make a reference to this Court. The pleader's fee Rs. 50. The non-applicant shall pay applicant's costs.

*A. I. R. (1927) Nag. 336; 104 Ind. Cas. 336.
(1). I. L. R. 46 Cal. 189.

[201] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
Before Sir George Rankin, Kt., Chief Justice and Mr. Justice Mitter.
 [15th July, 1927.]

Messrs. Tricumchand Dansing

*Appellants.**

v.

The Chief Revenue Authority, Bengal

Respondent.

Income-tax Act (VII of 1918) Sec. 26—"Demand", meaning of—Original assessment to Excess Profits Duty—Revised reduced assessment by Chief Revenue Authority—If a 'demand' within Sec. 26—Application for rectification of mistake therein—Limitation, if runs from original demand under Sec. 20, or order of revised assessment.

The word "demand" in Sec. 26 of the Income-tax Act (VII of 1918) means the demand in connection with which occurred the alleged mistake sought to be rectified thereunder and applies to a determination under Sec. 22, 23 or 24 of a sum or extra sum to be payable by the assessee in such manner as to bind him.

Where an assessment to excess profits duty was subsequently revised and reduced by the Chief Revenue Authority and an application was preferred under Sec. 26 of the Income-tax Act (VII of 1918) for rectification of an alleged mistake in the revised assessment, the period of one year prescribed in the section must be calculated not from the date of demand originally issued under Sec. 20 but from the date of the order of the Chief Revenue Authority which would be a 'demand' within the meaning of Sec. 26.

Appeal [Civil Appeal No. 33 of 1927] from an order of Mr. Justice Pearson dated the 24th January, 1927, made in the exercise of ordinary Original Civil Jurisdiction.

S. C. Bose and Satish Bose, for the appellants.

B. L. Mitter, Advocate General and S. M. Bose for the Chief Revenue Authority.

JUDGMENT.

RANKIN, C. J.—This is an appeal from a decision of my learned brother Mr. Justice Pearson upon certain questions stated for the opinion of the Court under section 51 of the Income-tax Act of 1918. The assessees in this case complained of the amount at which they had been assessed for excess profits duty and they applied to this Court and obtained an order in the nature of *mandamus* directing the Chief Revenue Authority to state certain questions for the opinion of the Court. The Chief Revenue Authority has stated those questions. In the result it appears that it is necessary for this Court to give its opinion upon the first of the questions so stated. That question is thus framed: "Whether the time prescribed by section 26 of Act VII of 1918 is to be reckoned from the original demand or from the making of the revised assessment whereby refund was ordered on revision of assessment revised by the Board on the 2nd of December, 1921". That question becomes more or less intelligible on consideration of the following facts.

The assessees were engaged in three different places including Serajganj in the District of Pabna in the business of jute. The year for which they were being assessed was the year 1919-20 and on the 15th of March 1920 a notice of demand was served upon them for income-tax at a certain figure. On the 25th of March 1920 a notice of demand was served upon them for excess profits duty. According to that notice of demand it would appear that they had to pay in respect of excess profits duty the substantial sum of Rs. 8,384 which they, pending subsequent proceedings, paid. Now, against the assessment to income-tax they appealed to the Commissioner under section 21 of the Income-tax Act of 1918. They persuaded the Commissioner that for the previous year in question they had made no profit and, to use the language of section 22 of the Income-tax Act, he cancelled the assessment. As regards the

assessment to excess profits duty the petitioners lodged a petition with the Chief Revenue Authority as required by the Excess Profits Duty Act.

Upon this matter coming before the Chief Revenue Authority that Authority took the view, differing from the view that the Commissioner had taken in dealing with the income-tax assessment, that the profits had been calculated on the wrong accounting period, that they ought not to have been calculated on Sambat 1975 but either Sambat 1974 or else for the ordinary financial year ending with the 31st of March 1919. He remitted the matter on this question of the excess profits duty to the Commissioner. He remitted it to the Collector. The Collector had a report made to him by the Assessor and it then appears that the Collector heard the parties, heard what they had to say upon the Assessor's report and came to the conclusion that the profits for the purpose amounted to Rs. 77,000. The assesseees say that they got no opportunity of examining the Assessor's report; but the statement of the case made to the Court by the Member of the Board of Revenue is to the contrary. The matter went to the Commissioner. He estimated and held that the profits were Rs. 49,397. Then the matter went to the Chief Revenue Authority by an application which was dealt with on the 2nd of December 1921. The Chief Revenue Authority came to the conclusion that the figure which the Commissioner had arrived at was the correct figure and accordingly on that basis, out of Rs. 8,384 which had been paid on the original assessment, a refund to the assesseees was due of Rs. 1,419, and that refund was made. The order of the Commissioner cancelling the assesseees' assessment to income-tax and directing a refund of the money paid in that respect was never interfered with and ultimately the assesseees obtained refund of all that they had paid for income-tax and they were therefore in the position that, while under section 19 of the Income-tax Act of 1918 this matter might be adjusted upon the actual figures at the end of the year of assessment, the assesseees have no grievance in respect of income-tax. Their grievance has reference to excess profits duty. They say that on going into the Assessor's report on the basis of which the Chief Revenue Authority assessed them to excess profits duty on the basis of profits of Rs. 49,397 they discovered that there were three palpable mistakes. In one case by a slip of pen the figure 1 (one) has come before the figure 5 making a difference of Rs. 10,000. It is said also that when you look at the Assessor's report you find that he has taken the closing stock as part of the income for the year. In other words, they say upon an inspection of the Assessor's report that it contains obvious and undoubted mistakes. Now, on none of the affidavits in this matter and (we are assured by Mr. Bose for the assesseees) in no affidavit before any Revenue Authority have these allegations as to these palpable mistakes been disputed.

In these circumstances, the assesseees sought a remedy. They applied first of all to the Collector on the 31st of May, 1922 and they asked him to exercise his powers under section 26 of the Act to correct the mistakes. The words of that section, which has been applied to excess profits duty, are these : "The Collector may, at any time within one year from the date of any demand made upon an assessee, rectify any mistake in connection therewith which has been brought to his notice by such assessee, and make a refund to such assessee in respect thereof". The Collector held that the period of "one year from the date of any demand" referred to the notice of demand to be served under section 20 of the Act. In this case the only notice under section 20 was the original demand which was served in March 1920. The Chief Revenue Authority did not deal with this matter until the 2nd of December, 1921, that is to say,

eighteen months or more after the original demand. The Collector says, however, that as regards any mistake in that order he cannot entertain an application because it is more than one year from March 1920. That is the first question and indeed in the end the only question before us.

The learned Judge on the Original Side has agreed with the Collector and his view is shortly this: "I think that the demand mentioned in section 26 has reference to the demand in the prescribed form referred to in section 20. Consequently I would answer the question in paragraph 25 (a) of the petition by saying that the time under section 26 must be reckoned from the original demand in March 1920, the only demand there has been".

Now, when we come to consider that question in this Court, it is very properly conceded by the learned Advocate-General that in the circumstances of this case the order made by the Chief Revenue Authority on the 2nd of December 1921 was a "demand" within the meaning of section 26 of the Income-tax Act of 1918. I have no doubt myself that that is so upon a consideration of the relevant sections. The ordinary section dealing with an original demand is section 18. It says that if the Collector is satisfied that a return is correct and complete he shall assess the sum payable by the assessee. If he has reason to believe that the return is incorrect and incomplete then he may require the assessee to attend and, after examining any account and hearing evidence, he shall by an order in writing determine the total income of the assessee for the previous year, and assess the sum payable by the assessee for the year in which the return is made on the basis of such determination. By section 19 when in a subsequent year a return has been made and the actual receipts for the then previous year are known it is provided that the difference between the actual profits and the profits upon which income-tax has been paid the year before shall be taken into account and the difference shall be paid by or refunded to the assessee as the case may be. There is a provision in the case of death or insolvency which enables an immediate adjustment to be had in the meantime. Section 20 says that when the Collector has determined a sum to be payable either under section 18 or 19 he shall serve on the assessee a notice of demand. The assessee objecting to the amount to which he has been assessed under section 18 or to an adjustment under section 19 may appeal to the Commissioner. The petition shall ordinarily be presented within thirty days of "receipt of the notice of demand". The Commissioner shall pass such order thereon whether by way of confirmation, rejection, enhancement or cancellation of the assessment or the adjustment or otherwise and fixing such time for payment as he thinks fit. The Chief Revenue Authority acting under section 23 may make an order enhancing the sum payable but not without hearing the assessee. By section 24 the Collector or the Commissioner, if they are satisfied that the assessee has concealed particulars of his income, may direct the assessee to pay double the rate on the difference between the true sum and the sum which has been put forward. Now, bearing in mind these provisions of the Act, the question is—when we come to section 26 and find the word "from the date of any demand made upon an assessee", are we to read that as meaning "from the date of receipt of any notice of demand under section 20?" In my judgment, that is not the meaning of the phrase. We have to identify the demand in connection with which the alleged mistake occurred. The word "demand" would cover a case of enhancement by the Commissioner under section 22 or by the Chief Revenue Authority under section 23. It would cover a case under section 24 where the Collector or the Commissioner orders a man to pay double the rate. It seems to me looking to the terms of the second sub-section of section 21 that when the statute means

to say "from the receipt of the notice of demand" it says so and that the word "demand" in section 26 applies to a determination of a sum or extra sum to be payable by the assessee in such manner as to bind the assessee. Therefore, in my judgment, the learned Advocate-General has rightly conceded that the order of the Chief Revenue Authority was a demand. That demand was made on the 2nd of December 1921 and it appears that the Collector within one year from that date has power to deal with the objections.

It seems to me that in this case the other questions which have been referred to us do not arise and need not be dealt with, and as the questions marked (b), (c) and (d) are no longer pressed we confine ourselves to the first question. In my opinion, this matter must be disposed of on the basis that at the time the application was made to the Collector the application was in time, and we should answer question (a) accordingly.

The applicant is entitled to his costs of this appeal and before Mr. Justice Pearson and the costs reserved by Mr. Justice C. C. Ghose on the 9th of July 1925.

MITTER, J.—I agree.

C. C. Bose, Solicitor for the Appellants.

G. C. R. Taylor, Solicitor for the Chief Revenue Authority.

[202] PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT LAHORE

Present.—Lord Sinha, Lord Blanesburgh and Sir John Wallis.

[26th July, 1927.]

The Delhi Cloth and General Mills Company, Ltd.,

*Petitioners.**

v.

The Commissioner of Income-tax, Delhi, and another

Respondents.

Income-tax Act (XI of 1922), Ss. 66-A (2) & (3)—Right of appeal to Privy Council—Scope and limits of—If confined to cases certified by High Court—High Court orders passed prior to enactment—If appealable to Privy Council—Retrospective operation—Civil Procedure Code (V of 1908), Ss. 109 & 110.

The right of appeal to the Privy Council conferred under Sec. 66-A (2) of the Income-tax Act is limited to cases which are certified by the High Court to be fit for appeal and excludes cases which fall within the requirements of Sec. 110 of the Civil Procedure Code. The words "so far as may be" in sub-section (3) of Sec. 66-A confine this statutory appeal to the cases described in sub-section (2).

The provisions of Sec. 66-A (2) depriving of their existing finality orders of High Court which were final prior to the enactment of this section are provisions which touch existing rights and consequently the right of appeal thereunder cannot be retrospectively invoked in respect of orders passed prior thereto.

Colonial Sugar Refining Co. v. Irvin, (1905) A.C. 369, Applied.

Petitions for special leave to appeal to His Majesty in Council from the orders of the High Court, Lahore, dated the 6th and 12th January, 1926, passed on references made under section 66 of the Indian Income-tax Act, XI of 1922. Leave to appeal to His Majesty the King in Council from the aforesaid orders was first applied for to the Lahore High Court and, on leave being refused by that Court, the present petitions for special leave were preferred to His Majesty in Council.

The Judgment of the High Court (Broadway and Zafar Ali, JJ.) dated the 18th December, 1926 refusing the leave is as follows :—

* (1927) 54 Ind. App. 421; 53 M.L.J. 819; 25. A.L.J. 964; 32 C.W.N. 237; 47 C.L.J. 1; A.I.R. (1028) P.C. 242.

This is an application for leave to appeal to His Majesty in Council. It purports to be made under sections 109 and 110 of the Civil Procedure Code, but really is an application under section 66-A, sub-clause (2) of Act XI of 1922 as amended by Act XXIV of 1926, which came into force on the first day of April 1926. The facts are that a reference was made under section 66 of the Income-tax Act 1922, by the Chief Commissioner of Delhi in connection with the assessment made on the Delhi Cloth and General Mills Company, Limited, Delhi. The company had set aside a sum of Rs. 1,00,000 in the year 1918 as a provision against bad and doubtful debts. In the year 1922 this sum of Rs. 1,00,000 was brought into account and shown as profits. At the same time the company contended that the amount was not assessable in the year 1922 inasmuch as the said sum of Rs. 1,00,000 had accrued as profit in the year 1918. It was held by a Division Bench of this Court by judgment dated 6th January 1926, that the claim made by the company was erroneous and that the said sum of Rs. 1,00,000 had been rightly included in the profits for the year 1922 and correctly assessed to income-tax. It is against the judgment of the Division Bench of this Court that the Company desires a certificate for leave to appeal to His Majesty in Council. Now at the date when this decision was pronounced the order of the Court was final and not open to appeal to the Privy Council. Act XXIV of 1926 added to the Income-tax Act of 1922 section 66-A, sub-clause (2) of which is to the following effect :

An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

This in terms is the same as section 109 (c) of the Civil Procedure Code. Inasmuch as a reference under section 66 of the Income-tax Act postulates the existence of a question of law, it is perfectly clear that the intention of the Legislature in adding section 66-A to the Income-tax Act was to enable an appeal to His Majesty in Council in cases in which the High Court could certify that the question of law involved was one of great private or public importance; it has been laid down by their Lordships of the Judicial Committee that the grant of a certificate under section 109 (c), Civil Procedure Code, is not a matter which is left entirely in the discretion of the Court but is a judicial process which could not be performed without special exercise of that discretion; vide, *Banarshi Parsad v. Kashi Krishna Narain* (1). In *Nattu Kesava Mudaliar v. Govindachariar*, (2) a case decided by a Division Bench of the Madras High Court, it was pointed out that section 109 (c) of the Civil Procedure Code contemplates a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not expressly measurable in money, it is of great public or private importance. In another case decided by a Full Bench of the Madras High Court namely, *Raja of Ramnad v. Thiruneela Kantham*, (3) it was pointed out that when in a case the point of issue appears to be one of general importance but not of sufficient importance to the proposed respondent to warrant putting him to the expense of an appeal to the Privy Council, leave to appeal should be refused. Again in *Mritunjoy Praharaj v. Balmokand Kanungo* (4) a Division

(1) (1901) I.L.R. 23 All. 277 (P.C.).

(2) A.I.R. (1924) Mad. 231.

(3) A.I.R. (1923) Mad. 232.

(4) A.I.R. (1921) Pat. 33.

Bench of the Patna High Court held that it was not enough to entitle a High Court to grant special leave to appeal to His Majesty in Council under section 109 (c), Civil Procedure Code, that a decision upon the construction of a section of a Tenancy Act will affect incidentally the rights of those who have holdings or tenures subject to the Act. It may be that in the present case the decision sought to be appealed against might affect the action or the position of the other companies who sought to evade the payment of Income-tax by adopting the method that was adopted by the present petitioner. We do not think, however, that the point of law which is involved in the present case is one of such universal or paramount importance as would warrant the grant of the certificate prayed for and we therefore dismiss this petition with costs.

We would note that the application in the case as well as in another case with which we are about to deal, was filed in a very incomplete condition. It was filed on the 26th of April 1926, but was not ultimately put into proper form till 22nd July 1926. As, however, the learned Government Advocate did not press the question of limitation we have refrained from expressing any opinion on the point.

Lowndes K. C. and Raikes, for Petitioners.

Dunne K. C. and K. Brown, for Respondents.

JUDGMENT

LORD BLANESBURGH:—These petitions are each of them for special leave to appeal from orders made by the High Court of Judicature at Lahore on references to that Court under section 66 (2) of the Indian Income-tax Act, 1922. In each case the sum in dispute exceeds Rs. 10,000. In each the order in question was made before the 1st April 1926—that in the first of the two cases being of the date the 12th January, 1926, and that in the second having been made on the 6th January, 1926. In each case also the High Court refused to certify that the case was a fit one for appeal to His Majesty in Council. With these facts for its foundation, an interesting argument was addressed to the Board upon the nature of the statutory appeal in such cases as these, and upon the question whether in the present instances there is any such appeal at all.

The learned Judges of the High Court were of opinion that the petitioners had a right of appeal to His Majesty in Council provided they could, in effect, bring their cases within the requirements of section 109 (c) of the Code of Civil Procedure, but not otherwise. They dealt with the applications for certificates on that footing, and they dismissed them. Hence the present petitions.

At the hearing before the Board, the view of the High Court was resolutely challenged by the petitioners. It sufficed, it was contended, that the cases should fall within the requirements of section 110 of the Code; the petitioners' right of appeal was in no way conditional on compliance with the requirements of section 109 (c). The respondents on the other hand, supported, as applied to the general case, the view of the High Court, but contended that, for the petitioners here, there was, for reasons which will appear in the sequel, no statutory right of appeal at all.

These rival contentions raise questions of great general importance. It has seemed to their Lordships to be convenient that they should definitely pronounce upon them.

The legislative history of the subject is a short one. No express provision for appeals to His Majesty in Council from orders of a High Court in

India made upon references either under section 51 of the Indian Income-tax Act, 1918, or under section 66 of the Act of 1922, is to be found in either statute, but until the case of *Tata Iron and Steel & Co., Ltd., v. Chief Revenue Authority of Bombay* (1) was decided by the Board, it was apparently generally supposed in India that appeals from such orders were regulated by sections 109 and 110 of the Code of Civil Procedure, to which reference has already been made. The effect of the judgment in the case cited was, however, definitely to lay it down that from these orders there was, in fact, no statutory right of appeal at all. And such was the position until the 1st April, 1926, when the Indian Income-tax (Amendment) Act, 1926, came into force, by section 8 of which it is provided that immediately after section 66 of the Indian Income-tax Act, 1922, a section should be inserted, of which it is convenient to transcribe the first three sub-sections.

“ 66-A. (1) When any case has been referred to the High Court under section 66, it shall be heard by a Bench of not less than two judges of the High Court, and in respect of such case the provisions of section 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent, or in any other law for the time being in force.

“ (2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

“ (3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court ”.

It is upon these sub-sections that the question now under discussion depends, and as to them it will be noticed that the appeal thereby given is by sub-section (2) confined to a case which the High Court certifies “ to be a fit one for appeal to His Majesty in Council ”. These words are textually the same as the concluding words of sub-section (c) of section 109 of the Code of Civil Procedure, and, coupled with the carefully limited referential words to the Code of Civil Procedure in sub-section (3), suffice, in their Lordships’ Judgment, to exclude from any right of appeal cases which fall within the requirements of section 110 of the Code, and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. It was conceded in argument that if sub-section (2) of the section had stood alone, it would be difficult to escape from the construction of it which has just been indicated. It was contended, however, that the reference to the Code in sub-section (3) was made in terms sufficiently comprehensive to include within the class of appealable cases all that are defined in the provisions incorporated by reference. Their Lordships cannot agree with this contention. The words of qualification, “ so far as may be ”, in sub-section (3) are, in their judgment, apt to confine the statutory right of appeal to the cases described in sub-section (2). To this extent, therefore, their Lordships are in agreement with the High Court.

But a further point remains. Is there under this section any appeal at all from an order of the High Court made before the Act of 1926 came into force?

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial*

Sugar Refining Company v. Irving, (1) where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect. On the contrary, they think there is a clear suggestion that a judgment of the High Court referred to in sub-section (2) is one which under sub-section (1) has been pronounced by "not less than two judges of the High Court", a condition which was not itself operative until the entire section came into force.

In their Lordships' judgment, therefore, the petitioners in these cases have no statutory right of appeal to His Majesty in Council. Only by an exercise of the Prerogative is either appeal admissible.

Both petitions their Lordships have, from this point of view, carefully considered. They have not forgotten that the circumstances are somewhat special; that the right of appeal introduced by the Act of 1926 is very probably conceded in order to rectify an omission inadvertantly made from previous legislation, and is not one thought of for the first time. Even so, however, their Lordships are unable to find in the circumstances of either case sufficient ground for any exercise of the Prerogative in favour of the petitioners.

Their Lordships will accordingly humbly advise His Majesty that both petitions should be dismissed and with costs.

Solicitors for petitioners : *T. L. Wilson & Co.*

Solicitors for respondents : *Solicitor, India Office.*

[203] IN THE COURT OF THE JUDICIAL COMMISSIONER, NAGPUR.

*Before Mr. Findlay, Judicial Commissioner and Mr. Macnair, Additional
Judicial Commissioner.*

[4th August, 1927.]

Moulaha M. E. R. Malak

Assessee.*

v.

The Commissioner of Income-tax, Central Provinces

Referring Officer.

Income-tax Act (XI of 1922), Ss. 4 (3) (i) and 66 (3)—Atbae—Malak Badar or Mehdibag community—Property of the Society, if held in trust wholly or in part—Claim of exemption as wakf—'Wholly' in Sec. 4 (3) (i), meaning of—'Property,' if includes carrying on of trade—Points refused reference by Commissioner—If can be raised before Court without application under Sec. 66 (3).

The *Atbae—Malak Badar* community is a small body of persons united by the bond of common religion who have bound themselves into a society more or less of a communistic nature. The property of the society is administered by the *Dayee* as its spiritual head, the income being devoted to the suitable maintenance of the dignity of the Head and defraying all his personal expenses, the maintenance and education of the members, the carrying on of trade and other pursuits and also to certain religious and charitable

*A. I. R. (1928) Nag. 10; 105 Ind. Cas. 155.

(1) L.R. (1905) A.C. 369.

purposes. No particular portion of the income or the property is compulsorily devoted to religious or charitable purposes, the *Dayee* having an absolutely free hand in the matter. On an assessment to income-tax, exemption was claimed under section 4 (3) (i) of the Income-tax Act on the ground that the income of the society was derived from property held on trust, wholly or in part.

Held (1) that the primary purposes of the society, namely, the providing for the maintenance, education and the like of the community, not being public purposes and there being no substantial and permanent dedication to religious, pious or charitable purposes, there was no trust or a *Wakf* as recognised by the Muhomedan Law, within the meaning of Sec. 4 (3) (i) of the Act,

(2) that as no definite part of the property or income was allocated for religious or charitable purposes, the various objects of the community being inextricably mingled, there was not even a trust in part for religious or charitable purposes within the meaning of the said section.

Majib-un-Nissa v. Abdur Rahim, 23 All. 233, followed.

The word 'wholly' in section 4 (3) (i) must be read in its ordinary acceptation as closely akin to the word 'solely'.

Lumbton v. Kerr, (1895) 2 Q.B. 233, followed.

At the hearing, the Standing Counsel for the Commissioner of Income-tax conceded for the purposes of this reference that the word 'property' in Sec. 4 (3) (i) of the Act would include the carrying on of a trade in accordance with and for the purpose of the trust.

In the absence of an application under Sec. 66 (3) of the Act, it is not competent to the Court to consider questions or contentions raised before the Commissioner but expressly or impliedly refused by him to be referred to the Court.

Case [Miscellaneous Judicial Case No. 59 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Central Provinces, for the opinion of the High Court.

CASE.

The Atba-e-Malak Badar Community residing at Mehdibagh, a hamlet of Nagpur, sometimes called the Mehdibaghwalas, through their spiritual head, Moulana M. E. R. Malak, returned an income of Rs. 25,456 for assessment during the year 1924-25. This income was from taxable sources. The assessee alleged that the institution being charitable and religious, the income was exempt from taxation. Enquiries as regards the taxable income were, however, made and the Assistant Commissioner, who made the assessment in this case, found the taxable income to be as follows :—

Rs. 463 interest on securities

Rs. 1,863 income from property

Rs. 24,670 income from business,

Rs. 5,615 income from partnership,

and assessed it accordingly.

2. An appeal was filed against this assessment and it was again contended that the income was exempt. Objections were also taken in respect of a few items that had not been allowed and in appellate order dated the 19th June 1926, I held that the income was taxable though certain reductions were granted under some sources of income. The assessment was thus made on following incomes only :—

Rs. 463 interest on securities

Rs. 1,795 income from property

Rs. 20,287 income from business

Rs. 5,615 income from partnership.

This income was made in the three Manihari and other kinds of shops at Nagpur, one at Umrer and one at Chhindwara.

3. An application dated the 17th July 1926 was made for reference to the High Court and points of law shown as issues Nos. 1, 2, and 3, with

their sub-heads, were asked to be referred to the High Court. Dr. Sir Harising Gour and Mr. S. B. Gokhale, appeared for the applicant on the 20th July, 1926, and agreed that as issues Nos. 2 and 3 dealt with questions of fact and not questions of law, they need not be referred to the High Court. Dr. Sir Harising Gour further agreed that as the chief point was whether the income of this institution was taxable or not, only one question need be referred to the High Court, i.e., "Whether or not the income in question made by the Mehdibagh shops now said to be under the proprietorship of Mr. M. E. R. Malak, is exempt from taxation under section 4 (3) (i) and (ii) of the Income-tax Act? If not what portion of it is taxable?" But on the 2nd August 1926, an application was received by registered post signed by Sheikh Tyeb Kazi, general agent to the assessee, requesting that the issue framed by Dr. Sir Harising Gour should not be referred to the High Court, but that all the questions raised in the first application might be referred to it. A copy of this application is enclosed. I beg therefore to refer only the first two issues stated in the first application dated the 17th July 1926, for the decision of the learned Judges of the High Court, and not issue No. 3 which deals with questions of fact as I shall show below. The points that I am asked to refer to the High Court are :—

ISSUE NO. 1

(a) Whether assuming the facts as set out in paragraphs 1 to 8 of the report made by Mr. D. E. Sanjana (Income-tax Officer) to be correct, is there or there not a *Wakf* of the whole of the property covered by the trust deeds of 1917 and 1922 as well as of what was freshly acquired with the help of that property within the meaning of the *Wakf* Validating Act No. VI of 1913 and within the meaning of the general law relating to religious and charitable trusts?

(b) Is there any uncertainty in the trust having special regard to the Mohammadan Law?

(c) Whether the word "property" as used in section 4, sub-section (3) clause (i) of the Income-tax Act, does or does not include the carrying on of a trade in accordance with and for the purpose of the trust?

ISSUE NO. 2.

(a) In the event of the learned High Court holding that only a part of the property is held in a religious and charitable trust, is it or is it not necessary to enquire into the point, viz., what portion of property fell under the heading of Trust Property and what was the income from that part which permits the exemption being granted?

(b) Whether the rule of Mohammadan Law with respect to allowable charges of management of a *Wakf* ought or ought not to be respected in deciding the question what the taxable income was?

ISSUE NO. 3.

(a) Whether having regard to assumption made by the Assistant Commissioner of Income-tax that bicycles worth Rs. 432 were connected with the Itwari and Sitabuldi shops, could the Commissioner disallow those items on the ground set out in para 8 of his order without allowing the petitioner an opportunity of proving the fact doubted by the Commissioner?

(b) Whether the Income-tax Department was competent to charge more than 12½ percentage on the income from business when no special or unusual circumstances have been shown to have intervened, nor without showing that similar businessmen were charged more percentage than what is stated above? Whether the observations of the Commissioner on the point in para 7 were

justified in view of the materials on record which were available to the assessee ?

(c) Whether the procedure of the Commissioner in not making available to assessee the report made by the Income-tax Officer on further enquiry after remand and in not giving the assessee a right to urge objection to that report was a valid one?

4. Before expressing any opinion on the questions under reference, it seems necessary to explain the nature of the institution called the "Atba-e-Malak Badar Community" with Mr. M. E. R. Malak as its spiritual head. A note by the assessee giving the "History, Constitution, etc." of this Community is appended herewith.* As stated in para. 23 of this note, the Atba-e-Malak Badar Community do not reveal to the public at large their esoteric tenets which are reserved for "*Ahwaloons*", (Members residing at Mehdibagh) only. This makes it somewhat difficult to understand the exact nature of this community. However, as this note itself states, this society was founded by Abdul Hussain Jiwabhai Saheb (Malak I) with the "primary object to further religious culture side by side with pure wordly life". Abdul Hussain Jiwabhai was afterwards joined by Ghulam Hussain Mian Khan Saheb, better known afterwards as Khan Bahadur H. M. (Ghulam Hussain Badruddin) Malak. This community was founded in 1891 at Nagpur. This community is a puritan section of Dawoodi Bohras who are Shia Mohammadans.

The Malak has two classes of followers, one called "*Ahwaloons*" (ecclesiastics who live at Mehdibagh and under his direct spiritual and temporal control) and the others called "*La-hequoons*" (ordinary members who reside outside Mehdibagh and who own property of their own). As appears from the *Wakf* deed dated the 25th August 1917 and also from the reply of the agent dated the 30th July 1926, the *Ahwaloons* who became the members of this community made gifts of their property to their priest and Malak, and took up their residence at Mehdibagh itself. With the capital derived from such gifts the shops mentioned above including the Pehdi shop of Bombay and one at Ujjain, were started and improved. As stated in the trust deed dated the 25th August 1917, the late Khan Bahadur Malak being "desirous of framing a scheme for the administration of the said properties in the manner hereinafter contained so that the said community may permanently benefit from the same" executed the said trust deed for the purposes mentioned in the deed which may briefly be stated as :—

(1) For maintaining the dignity of the Malak himself and defraying all his expenses, etc.

(2) "For providing all the members of the Atba-e-Malak Badar community with board, lodging, clothing and other necessities of life as I, and after me, the said *Dayee*, may deem fit."

(3) For carrying on agricultural, commercial and other purposes of the said community.

(4) For giving suitable secular and religious education to the members of the said community.

(5) For entertaining guests, giving "At-Homes" or charities.

(6) For such donations for charitable or religious purposes, etc., as the Malak may deem fit.

As Dr. Leva-i-Haq, who was nominated the *Dayee* according to this trust deed, died before Khan Bahadur H. M. Malak, another trust deed dated the 25th November 1922 came to be executed. Under this trust deed the

objects of the trust are practically the same as in the first deed. Now the question for decision is whether this is a religious or a charitable institution, or whether this is a college of ecclesiastics, as they put it, who are forbidden to acquire property for themselves.

5. The contention that the income is not taxable, is not a new one. It was raised in 1919 and the Financial Commissioner (Sir Henry Crump) in disallowing it remarked: "I have carefully considered the trust deed and the evidence produced in this case and also the order of the Commissioner and the Deputy Commissioner. Certain individuals governed by the same religious tenets have formed themselves into a society of a communistic nature and under the trust deed the head of the society administers the property the income from which is devoted to the maintenance and education of the members of the society and their families and also to certain charitable and religious purposes. It is, however, obvious that the main object of the society is the maintenance of its members, for without such maintenance the whole fabric of the society must break down. Such a purpose cannot be considered to be religious or charitable purpose. For there is no specific declaration that any portion of the property governed by the trust deed is set aside for such purposes. In the absence of any such specification I hold that no exemption from income-tax can be claimed." The institution has, therefore, continued to be assessed to income-tax. I fully agree with what has been said by the Financial Commissioner in this respect. To me this community seems to be a society of persons who, being limited in number (about 250 in Mehdibagh), and holding the same religious tenets, have joined their property and labour and selected one man to guide their life, both temporal and spiritual. It is members of the community that work at different shops. They are the chief hands in the shops and take in outsiders rarely, and these only for menial or other unimportant work. As stated in the trust deed itself, they were not even paid for this work in the shops but were only fed, clothed and generally provided for. Perhaps owing to strict scrutiny by the Income-tax Department, or some other reason, of late, salaries for the men working in several shops, belonging to this community, have been fixed and drawn, and within the last few years they have increased as shown below :—

1921—22	..	Rs. 31,831
1924—25	..	Rs. 39,347
1925—26	..	Rs. 45,273

If the trust deed were to be strictly followed it would mean that no salaries at all should have been paid. Sheikh Tyeb's statement dated the 4th January 1926 which says that members of the Community who are employed mainly in the business have established a mess for their own use at their own expense, also suggests that they are still being fed at the trustee's discretion as stated in the trust deed; and hereafter the question for the Income-tax Department would be whether to allow such expenses or not.

OPINION

ISSUE NO. 1

6. (a) The facts are not to be assumed to be as stated by Mr. D. E. Sanjana, in his report (not dated) but are as stated above. According to Shia Law, the *Wakf* is not valid unless the settlor divests himself of the property from the date of the creation of the *Wakf*. Hence a settlor, according to this law, could not reserve any portion of the income of the *Wakf* property to himself during his life. In the present case, if the *Wakf* is supposed to have been made for charitable purposes according to Mohammadan Law in

general, of which I am doubtful, it is not valid because it reserves to the settlor the right "for suitably maintaining the dignity of myself as the Hijabe Moulana Malak during my lifetime and afterwards of the *Dayee* for the time being of the said community (hereinafter designated as the said *Dayee*) and defraying all the expenses including the expenditure of the personal establishment of myself and after me of the said *Dayee* and the expenses of journeys undertaken by me and after me by the said *Dayee* from time to time," (*vide* purpose No. 1 of the trust deed, dated the 25th August 1917). It is nowhere said what these expenses on the settlor himself would amount to. Hence it cannot be said definitely what portion of the income is subject to a valid trust and what not. Moreover, the ultimate question is not one of Mohammadan Law at all but one of the ordinary law of British India. It is whether there is a trust or other legal obligation within the meaning of section 4 (3) (1) of the Indian Income-tax Act, applicable to the entire property or to any distinguishable portion of it. I would request the Honourable Judges of the High Court to give decision on this point. To me it seems that the trust deeds of 1917 and 1922 do not create a religious or a charitable trust within the meaning of section 4 (3) of Act XI of 1922, so as to exempt from the tax the income from the property to which they relate, because the religious, charitable and other purposes are so inextricably mixed up that it is impossible to apportion the trust property or the income from it between them, while the trustees have full discretion as to the allocation of the income to the different objects. The whole gift fails for uncertainty.

(b) The uncertainty according to the Shia Law, is as stated above, that the settlor has not defined in the trust deed what portion of the income will be reserved for himself; nor is there any statement, expressed or implied, regarding the property ultimately reverting to the poor.

(c) As the trust deed itself fails for uncertainty this question does not arise.

ISSUE NO. 2.

(a) As stated above, the settlor has not divested himself of the property from the date of the creation of the *Wakf* and therefore the trust deed becomes invalid. The question whether any particular portion of the property falls under the heading of the trust property, therefore, becomes unnecessary.

(b) I am afraid I do not know how this question arises out of the facts of the case. There was no such plea taken in appeal before me, nor was any allowable charge of management of a *Wakf* left out of consideration. I think, therefore, that this is an unnecessary question.

ISSUE NO. 3.

(a) It is wrongly presumed that the Commissioner did not give the applicant the opportunity of being heard before disallowing this item of Rs. 432. This is a question of fact and has been admitted to be so by the counsel for the applicant, and I submit that I cannot refer it to the High Court.

(b) This also is a question of fact as admitted by the counsel for applicant. The percentages, or as they are called, the margins of profit, were calculated by the department after actual enquiry into the facts of this case. The purchase and the sale prices of many articles at the applicant's shop were looked into and the percentages calculated on these were adopted. This point, therefore, being a question of fact, is not referred to the High Court.

(c) It is wrongly presumed that the Commissioner did not allow the assessee access to the report made by the Income-tax Officer on further enquiry,

as this report and all the papers connected with it were on record and the applicant had several opportunities of looking into it. In fact on every day of hearing and even on other days, the assessee's agents did look into the case and nothing was withheld from them. This question being based on a misstatement of the facts, cannot be referred to the High Court.

M. V. Abhyankar, and *A. V. Wazalwar*, for the assessee.

G. P. Dick, for the Crown.

JUDGMENT

1. This is a reference made by the Commissioner of Income-tax, under section 66 of the Indian Income-tax Act (XI of 1922). The non-applicant, the Atbae-Malak Badar community residing at Mehdibagh, who for convenience of reference will be described in this Judgment as the Mehdibagh community, was assessed to income-tax on an amount of Rs. 28,160 for the year 1924-25. The assessment was made in respect of the following items of income :—

- Rs. 463 interest on securities ;
- „ 1,795 income from property ;
- „ 20,287 income from business ;
- „ 5,615 income from partnership.

Total exemption from income-tax was claimed on the ground that the income in question was derived from the property held under a trust or other legal obligation wholly for religious or charitable purposes, *vide* section 4, sub-section (3) (i) of the Income-tax Act. The Commissioner of Income-tax was asked to refer the following points for the opinion of this Court :—

ISSUE NO. 1.

(a) Whether assuming the facts as set out in paragraphs 1 to 8 of the report made by Mr. D. E. Sanjana (Income-tax Officer) to be correct is there or there not a *Wakf* of the whole of the property covered by the trust deeds of 1917 and 1922 as well as of what was freshly acquired with the help of that property within the meaning of the *Wakf* Validating Act No. VI of 1913 and within the meaning of the general law relating to religious and charitable trusts?

(b) Is there any uncertainty in the trust having special regard to the Muhammadan Law?

(c) Whether the word “ property ” as used in section 4, sub-section (3), clause (i) of the Income-tax Act, does or does not include the carrying on of a trade in accordance with and for the purpose of the trust ?

ISSUE NO. 2.

(a) In the event of the learned High Court holding that only a part of the property is held in a religious and charitable trust, is it or is it not necessary to enquire into the point, *viz.*, that (*sic*) what portion of property fell under the heading of Trust Property and what was the income from that part which permits the exemption being granted ?

(b) Whether the rule of Muhammadan Law with respect to allowable charges of management of a *wakf* ought or ought not to be respected in deciding the question what the taxable income was ?

ISSUE NO. 3.

(a) Whether having regard to assumption made by the Assistant Commissioner of Income-tax that bicycles worth Rs. 432 were connected with the Itwari and Sitabuldi shops, could the Commissioner disallow those items on the ground set out in para. 8 of his order without allowing the petitioner an opportunity of proving the fact doubted by the Commissioner?

(b) Whether the Income-tax Department was competent to charge more than 12½ percentage on the income from business when no special or unusual circumstances have been shown to have intervened, nor without showing that similar businessmen were charged more percentage than what is stated above? Whether the observations of the Commissioner on the point in para. 7 were justified in view of the materials on record which were available to the assessee?

(c) Whether the procedure of the Commissioner in not making available to the assessee the report made by the Income-tax Officer on further enquiry after remand and in not giving the assessee a right to urge objection to that report was a valid one?

2. As regards issues 2 and 3, the Commissioner of Income-tax held that a reference to this Court was either unnecessary or incompetent. No application was made to this Court under section 66, sub-section (3) of the Income-tax Act, on the subject of the disallowance of a reference on issues 2 and 3, and it is not, therefore, competent for us to consider the questions contained therein. We may add that, on 4th July 1927, an application was made by the non-applicant community to the effect that it was proposed to argue, before this Court, the contention already offered before the Commissioner of Income-tax that their case, in any event, would fall under sub-heads (ii) and (vii) of sub-section (3) of section 4 of the Income-tax Act. We found it necessary to hold in this connection that the reference made by the Income-tax Commissioner amounted to a refusal to state these points for reference to this Court, even if it can be assumed that there was a request from the applicant to the said Commissioner so to do. As in the case of issues 2 and 3, therefore, no application having been filed within due period of limitation by the non-applicant against this refusal, we found ourselves unable to admit the argument with reference to the two points in question. We are, therefore, solely concerned with issue No. 1 in the present order.

3. We find it unnecessary to re-state here in detail the history and constitution of the Mehdibagh community. A fair exposition thereof is to be found in the statement of the case submitted by the Commissioner of Income-tax and we have also on record enclosure B filed by the non-applicant community before the Commissioner of Income-tax, which enclosure gives a detailed history of the community.

We may say at once that as regards clause (c) of issue 1, which relates to the question whether the word "property" in section 4 (3) (i) of the Income-tax Act does or does not include the carrying on of a trade such as this community indulges in, the learned Standing Counsel for the purposes of this proceeding admitted that such trading might be considered to come within the term "property" in question. We, therefore, now proceed to dispose of clauses (a) and (b) of issue No. 1.

4. For the non-applicant to succeed it was necessary for him to prove that there was either a trust, or that the property was held under a legal obligation wholly or in part for religious or charitable purposes. It has been urged in this connection that the *Dayee* or the head of the community is a trustee purely and solely of all the property, that the trust is of such a nature that he cannot resile from it without committing a breach of trust and that, in the event of any such breach, action under section 92 of the Civil Procedure Code would be possible. It has further been urged that the property belongs to the community and does not belong to any particular individual including the trustee. The *Dayee*, in short, holds sway over the property only in his capacity of a spiritual head and has no personal interest therein. His

heir-at-law or ordinary successors cannot take any interest therein. Again the contention has been put forward that an entrant into the community, even if penniless, could claim equal interest with the other members, while on the other hand, any one who leaves the community, even if he has contributed all his property thereto, is liable so to leave without receiving anything in return. The members thus in a sense being personally propertyless, it has been urged that although the main object of the community is a religious and charitable one, its constitution inevitably demands that secular purposes should be included therein for the clothing, feeding and maintenance of the members and their families, while, in the case of the *Dayee*, personal expenses are essential for the maintenance of his dignity as spiritual head of the community. It has thus been claimed on behalf of the non-applicant that the ultimate aim of the community is a charitable and religious one.

5. Our attention has also been directed to the fact that the community has manifold activities besides those of trade-activities which include religious education, the maintenance of a charitable dispensary and the like. It has been suggested that the absolute power, which rests in the *Dayee* of choosing his successor and of holding office himself as long as he likes, is not inconsistent with the legal position of a trust.

6. Leaving aside for a moment the question whether there is, in reality, a legal trust at all in the case and assuming that this is so, we find it impossible to hold that the trust in question could be described as one wholly for religious or charitable purposes. The learned Standing Counsel has suggested that even if the word "wholly" were to be read as equivalent in popular language to "mainly", the non-applicant community would not, in the circumstances of this case, be entitled to succeed in their contention. For our own part, we think the word "wholly" must be read in its ordinary acceptation and is in this respect closely akin to the word "solely". Charles, J., in *Lumbton v. Kerr* (1), held that "a house occupied solely for trade or business" (Section 13 (1), (2), Customs and Inland Revenue Act, 1878, 41 V. c. 15) does not include a house occupied not only for business but also for the actual dwelling of persons, not mere care-takers who are the servants of the occupier.

7. Turning to the deeds of 25-8-17 and 25-11-22, it does not seem to us that the provisions of these deeds render it possible to accept the position urged on behalf of the non-applicant. Under these deeds, the *Dayee* had full power to use the income of the property or the *corpus* thereof for the following purposes :—

- (a) For the suitable maintenance of his dignity and for defraying all personal expenses ;
- (b) for providing all the members with board and lodging and the like ;
- (c) for carrying on agricultural, commercial and other pursuits of the said community ;
- (d) for giving suitable secular and religious education to the members ;
- (e) for entertaining guests and the like ; and
- (f) for donations for charitable or religious purposes, contribution to memorial funds raised for holding social, educational, religious, industrial, or political conferences or congresses, or for public entertainments.

Not only so, but the *Dayee* was to have absolute authority to sell, mortgage or lease, either permanently or for a term of years, any of the property of the community. Here, we have, in fact, a small body of persons united by the bond of a common religion, who have bound themselves into a society

more or less of a communistic nature. The property of the society is administered by the *Dayee*, the income being devoted to the maintenance and education of the members, to the carrying on trade and other pursuits and also to certain religious and charitable purposes. It is pertinent to point out that no particular portion of the income or of the property is compulsorily devoted to religious or charitable purposes. The *Dayee* in this connection has apparently an absolutely free hand and so far as the terms of the deeds go, he cannot be called to account, if only one per cent. of the income is devoted to religious and charitable purposes.

8. Our attention has been directed to certain remarks of Marten, J., in *Advocate General of Bombay v. Yusuf Ali Ebrahim* (1), where the learned Justice remarked that the more absolute the power of the trustee, the greater the trust. That is, in itself, an unexceptionable proposition, but the remarks do not seem to us to be capable of apposite application to the facts of the present case. The objects laid down in the constitution of the community are manifold, including as they do agricultural, industrial, commercial, religious and other pursuits; cf, for example, paragraph 3 of the deed of 25—11—22. We are, therefore, of opinion that, in any event, even assuming that we are here dealing with a trust, the trust cannot be described as one wholly for religious or charitable purposes. This fact, of itself, would take the so called trust outside the purview of S. 4, Sub S. 3 (1) of the Income-tax Act.

9. In the terms in which issue 1 (a) referred to us is framed, the question whether there could be said, in any event, to be a trust of the property in part for religious and charitable purposes, was not specifically raised, but we, nevertheless, find that, in his statement of the case, the Commissioner of Income-tax has dealt with this matter. We, therefore, consider it desirable to record our opinion whether in the present case there was, even in part, a trust for religious and charitable purposes. We do not, however, think that even this position can be properly predicated as regards the present case. The manifold purposes of the trust are so inextricably mingled that it is impossible to hold that any definite part of the property or of its income is allocated to such religious and charitable purposes. From this point of view also, we do not think it is possible to hold that there is even a trust here of the property in part for religious and charitable purposes.

10. We are, however, further of opinion that we are not, in reality, here dealing with a trust at all. The executant of the deeds in question has retained absolute control over the property in his own hands. Although it is true that, under the terms thereof the income and the *corpus* must be devoted to the numerous objects shown in the deeds, these objects as we have already indicated, are extremely wide, and they are further not only wide but vague. In this connection, it is necessary to lay stress on the words "other pursuits of the said community", which occur in paragraph 3 of the deed of 25-8-17. The position, in reality, is that, after providing for the maintenance of himself and the members of the community, the *Dayee* is at liberty to devote the property and its income to any or all of the other purposes stated in the documents. There is no definite portion of the property or of the income devoted to religious and charitable purposes. The decision of their Lordships of the Privy Council in *Mahomed Ahsanulla Chowdhury v. Amarchand Kundu* (2), is, on this ground, distinguishable from the present case. Moreover we agree, for the reasons stated by the Commissioner of Income-tax, that the element of uncer-

(1). 24 Bom. L.R. 1060 at p. 1091.

(2). I.L.R. 17 Cal. 498.

tainty enters into the constitution of the community to an extremely large extent. We may add that we do not think that section 92 of the Civil Procedure Code could possibly be applied to the present community, for we are of opinion that the provision for the maintenance, education and the like of the community, which is obviously the primary purpose provided for in the deeds, cannot possibly be described as a public purpose.

11. A reference has been made by Counsel for the non-applicant as well as by the Standing Counsel to the Mussalman Wakf Validating Act (VI of 1913), but we do not think the said Act has any application in the present case. It is impossible to postulate here that there has been a permanent dedication of property for religious, pious or charitable purposes. So far as the legal position of the community in this connection is concerned, the Wakf Validating Act of 1913 makes, in reality, no difference. We find in the present case no *wakf* in respect of the maintenance and support of the family of the persons constituting the trust. The present case is, moreover, closely parallel to that of *Majib-un-Nissa v. Abdur Rahim* (1). It is impossible, on the facts of the present case, to hold that the property is in substance dedicated to religious or charitable purposes. There has been no such entire or substantial dedication of the property as to bring it within the term *wakf*, and it is moreover, pertinent to point out here that there is no provision regarding the incidence of the ultimate benefit. It is conceivable, if not likely, that the community might entirely disappear through internal discord or the like. The law makes it imperative, *vide* Sec. 3 of the Mussalman Wakf Validating Act, that the ultimate benefit should be expressly or impliedly reserved for the poor or for any other purpose recognised by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

12. We, therefore, answer issue No. 1 (a) in the negative and hold that there was no *wakf* or trust of the property wholly for religious or charitable purposes, and we are further of opinion that the property is not held in part for such purposes. Issue No. 1 (b), in the circumstance of the last finding, does not require an answer because we hold that no trust was constituted for the reasons given above. Issue No. 1 (c), for the reason already stated, *viz.*, the admission of the Standing Counsel on the point, requires no finding. The non-applicant will bear the costs of the Commissioner of Income-tax as well as his own. We fix Rs. 200 as pleader's fee.

[204] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Mr. Justice Mullick, Kt., Acting Chief Justice and Mr. Justice Sen.

[11th August, 1927.]

Raja Radha Mohan Mansingh Harichandadan

Mardaraj Behrwarbar Rai, Raja of Parikud

Assessee.*

v.

The Commissioner of Income-tax, Bihar & Orissa

Referring Officer.

Income-tax Act (XI of 1922)—Parikud Raj—If permanently settled estate—Income from jalkars in his estate—If exempt from assessment to income-tax.

The Raja of Parikud (Orissa) who is only a tenure holder and not the proprietor of a permanently settled estate is not entitled to exemption from assessment to income-tax in respect of the income from *jalkars* within his tenure.

Case [Miscellaneous Judicial Case No. 91 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa, for the opinion of the High Court.

*A.I.R. (1928) Pat. 58 (2); 104 Ind. Cas. 841.
(1). I.L.R. 23 All. 233.

CASE.

The point of law to be referred to the High Court for decision in this case which arises out of the order in appeal and which emerges from the petition for reference filed before me may be stated as follows :—

“ Whether the income of the assessee (the Raja of Parikud) derived from fisheries is chargeable to income-tax or not, Parikud being a permanently settled estate ”.

This, as I have stated, is the question of law which emerges from the application for reference filed before me within one month of the passing of the appellate order by the Assistant Commissioner on 12-1-26. When the case came up for hearing, however, on 13-5-26, the petitioner changed his ground and then though somewhat reluctantly, arguing that it was my duty to frame the question, formulated the following question of law :—

“ Whether the income from fisheries in this case is chargeable to income-tax in view of the fact that the property which the assessee holds was paying a quit rent for the whole area at the time of the assignment of revenue by Government to one Fateh Muhammad in 1803 and that quit rent was fixed on an area including the area from which fishery income was derived ”.

2. In the first place, it seems to me that it is not open to the assessee to formulate this alternative question of law, as he has done, 5 months after the order passed in appeal by the Assistant Commissioner and in the 2nd place, the question of law which emerges from the application for reference does not really arise if the view which I hold is correct, namely, that the right of the assessee in the property in question is not a right in a permanently settled estate but is at present, whatever it may have been in past, the right of a tenure holder subordinate to that of a proprietor.

3. The correct principle to follow, in approaching a problem such as has arisen in this case, would appear to hold that all income is liable to income-tax unless it is exempted by one or other of the sections of the Income-tax Act, or unless it is or can be presumed to have been exempted by the provisions of any earlier law or Regulations which have not been repealed by the Income-tax Act.

4. The assessee in this case who holds property in the Puri District of the Orissa Division does not claim that his income should be exempted on the ground that it is agricultural income and it follows that if he is to succeed in claiming exemption he must prove that his case is covered by an older Act or Regulation which has not been abrogated by the Income-tax Act.

5. In this connection, it is necessary to examine the history of the property which the assessee, the Raja of Parikud, holds. Prior to the advent of British authority in Orissa, or, to be more precise, in this part of Orissa, the assessee's predecessors in interest paid a fixed quit rent of Rs. 1,600 annually to the Mahrattas who were the sovereign lords in Orissa. When this part of Orissa, however, came under British sway in 1803 after treaty with the Mahrattas, the British Government felt they owed compensation to those Rajas or chiefs who had helped them in acquiring sovereignty in this area, and to one of these, by name, Fateh Muhammad the British authority granted by *sanad* in the year 1803 a *jagir* which included the property hitherto held by the Raja of Parikud. This *sanad* was confirmed by the Settlement Commissioners in the year 1805, the confirmation being recorded in Section 34, Regulation III of that year and from that time the assessee or his predecessors in interest ceased to pay a quit rent to Government but paid instead to Fateh Muhammad or his successors. This quit rent has never been increased and from that date

the status of the assessee would appear to have become what is now generally called that of a tenure holder holding at a fixed rate.

6. It was at first argued by the assessee that what Fateh Muhammad obtained was an assignment of land revenue or, in other words, that Fateh Muhammad stepped into the position formerly occupied by Government and that the assessee continued to hold in the property a right of the nature of the right in a permanently settled estate. It was subsequently admitted, however, in the course of argument that the right conferred on Fateh Muhammad was that of a proprietor of a revenue-free estate so far as the relation between Fateh Muhammad and Government is concerned, and it follows, I think, that it cannot be held that the right which the assessee continued to enjoy was in the nature of a proprietary right. For this reason the ground taken by the assessee in paragraph 3 of the petition for a reference to the High Court, namely, that Parikud being a permanently settled estate, no income-tax is payable in respect of such income was given up and the amended ground then taken was that income-tax was not payable in view of the fact that the property which the assessee holds was paying a quit rent for the whole area at the time of assignment of revenue in the year 1803 to Fateh Muhammad and that quit rent included the income from the area from which fishery income is derived.

7. One point stressed by the assessee is really more of the nature of a point of constitutional law than of taxation law. It is this. That the British authorities in the year 1803, i.e., before the promulgation of the principles of settlement gave a *sanad* to Fateh Muhammad and that though this *sanad* was confirmed in the settlement of 1805 the area in question was exempt from settlement under that Regulation, because the tract had been transferred previously. In other words, the Crown having transferred to another party by act of its immediate representative and by virtue of its sovereign power the amount of revenue assessed by a previous sovereign over a certain area, this area ceased to be amenable to the general laws subsequently promulgated for the settlement of the tract. What this *sanad* of 1803 conferred on Fateh Muhammad was the right "to take the annual proceeds due from a certain area to Government and to appropriate the income from these Mahals after payment of certain collection charges": it empowered Fateh Muhammad "to make collection of the revenue and to demand from the raiyats what was legally due from them and nothing else". For easy reference I attach a copy of the *sanad* to this statement.

8. Now, it seems to me that the stipulation in this *sanad* might prevent Government from assessing Fateh Muhammad to income-tax in respect of non-agricultural income from the area granted to him by the *sanad*, though even this is doubtful as in making settlement under the Regulation referred to above, *sayer* income was not taken into consideration (See section 31 of the Regulation). But it is hardly a ground for holding that a person holding an interest in the property subordinate to that of Fateh Muhammad cannot be charged with income-tax in respect of non-agricultural income. I hold that the argument that because the Crown assigned its revenue in respect of this tract to Fateh Muhammad, therefore it cannot now assess non-agricultural income from this tract, is fallacious.

9. The assessee, as noted above, changed his ground and claimed that the income from fisheries was not chargeable to income-tax, because the property which he holds was paying quit rent for the whole area at the time of assignment of revenue in 1803 and that quit rent was fixed on an area including the area from which fishery income was derived.

10. Now, the assessee has no proof that the income from fisheries was so included. He holds no *sanad* from Government and in reality he holds the property whatever be the nature of his right in that property, in adverse possession ever since the time of the grant of a *jagir* right in it to Fateh Muhammad as noted in paragraph 599, page 413 of Madox's Puri Settlement Report. This is confirmed by the present day revenue records in the Collectorate which show as proprietor of the property in question the descendants of Fateh Muhammad, while the present assessee is noted in the *Khewat* of the Record of Rights as a tenure holder.

11. It will thus be seen then that the rulings in the *Darbhangha case* (1) and in *Indu Bhusan Sircar's case* (2) are of no help to the assessee, nor can the ruling in the *Singampatti case* (3) help him, for, in that case, the assessee in respect of whose income from forests and fisheries it was held that no income-tax is chargeable, was the proprietor of a permanently settled zamindari held under a permanent *sanad*, that *sanad* granting the zamindar in perpetuity the proprietary right in the land on his payment of an annual sum of tribute known as *Peishkush*. It might be that in this case the annual *jama* was not fixed after an examination of the assets of the estate, but was in the nature of an amount fixed after rough estimate and in that way it may be different from the principle of fixation of *jama* in the case of the Bengal Permanent Settlement Regulation. But the fact remains that in this Madras case, the assessee held direct from Government, and secondly, he held under a *sanad*, neither of which conditions are fulfilled in the case of the present assessee.

12. I trust I have stated the facts in sufficient details to enable the Court to come to a finding in this case.

13. My own views in this case may be summarised as follows :—The question of law as first formulated does not arise because the right of the assessee in the property in question is not that of a proprietor of a permanently settled estate, while in the second place, it is not open to the assessee to formulate or ask me to formulate an alternative question of law 5 months after the order passed in appeal by the Assistant Commissioner and even if this view is not accepted, sufficient reasons have, it is hoped, been adduced in the body of this reference to show that the claim of the petitioner is on its merits unsubstantiated.

Translation of the Persian Sanad granted to Sheikh Fateh Muhammad, Head of all Sheikhs and their Protector on the 23rd December 1803.

Under orders of His Excellency Marquis Wellesly, Colonel George Harcourt, Commander of the Honourable Company's Forces, and Mr. John Willo Mills are the Commander of the Subbah of Orissa. In pursuance to the terms of the agreement, dated 20th August 1803, you tendered to Colonel Campbell and Mr. John Mills we grant this *sanad* to you on behalf of the Honourable Company the English Government. As it is found on an enquiry into the old records, that you have been, since a long time rendering good services in Khanas Manikpatna, Bajrokote, Garjit, Andhari and Parikud, the annual proceeds thereof, dues to the Government, including the collection charges, which are in kind allowed as *Minah* to the respective officers and servants are hereby for ever conferred on you on account of your remuneration. You are hereby hereditarily empowered, under the terms of the agreement tendered by you, to receive all such moneys (that is) the income from the said *mahals* that remains after payment of the collection charges in shape

(1) 1 I. T. C. 303.

(2) 2 I. T. C. 221.

(3) 1 I. T. C. 181.

of Minah, to the respective officers in kind. You are also hereditarily empowered to make collections of the revenue (payable to Government but now conferred on you) from the said *mahals* according to the orders and Regulations of the English Government and to demand from the raiyats what is legally due from them and nothing else; you should not interfere with the respective dues of the several zamindars, Khandaits and Makadams, in the said *mahals*.

You should not collect or demand the arrear rents up to date and those for 1210, should not exact duty from passers-by and from *hats* and should not in any way attempt to receive or demand anything, the collection whereof has been prohibited by the Government, should not in any way press the raiyats or put them to troubles, should not extort more than what is legally due from them, should never show by carelessness or prove yourself unworthy of the high charge that has been given to you. Should keep the raiyats in good terms with one another and keep peace among them, and keep them in complete devotion to the British Government.

K. P. Jayaswal and G. P. Das, for the assessee.

C. M. Agarwalla, for the Crown.

JUDGMENT.

MULLICK, A. C. J.—The first question of law which the assessee asked the Income-tax Commissioner to refer to this Court was “whether the income of the assessee (the Raja of Parikud) derived from fisheries is chargeable to income-tax or not, Parikud being a permanently settled estate”. Subsequently that question was modified and a new question was propounded, namely, “whether the income from fisheries in this case is chargeable to income-tax in view of the fact that the property which the assessee holds was paying a quit rent for the whole area at the time of assignment of revenue by Government to one Fateh Muhammad in 1803 and that quit rent was fixed on an area including the area from which fishery income was derived”.

2. The Commissioner, however, has not clearly indicated what is the precise question or questions on which he requires our opinion. We again repeat that he must find the facts clearly and then state the points of law which arise out of those facts, and on which he requires our opinion, and he may then, if he chooses, give his own opinion and discuss the case.

3. The parties before us, however, have agreed that the point of law upon which our opinion is required is : whether the Raja of Parikud in this case is entitled to exemption for income-tax in respect of *jalkers* within his tenure.

4. Mr. Jayaswal puts the ground of exemption on the status of the Raja and the terms under which he was holding from Fateh Muhammad. It is found that in 1803 Fateh Muhammad obtained a revenue-free *jagir* from the East India Company over a tract of land which included the lands now in suit in respect of which up to that time the Raja had been paying a tribute of Rs. 1,600 annually to the Mahrattas. The effect of the settlement with Fateh Muhammad was to reduce the Raja of Parikud from an actual proprietor to a tenure-holder, and there is no analogy between the position of a permanently settled proprietor in Bengal who has entered into a permanent engagement based on gross produce in which fisheries have been included and a conquered Raja who by right of conquest was deposed from his position under the Mahrattas and reduced to that of a tenure-holder. There was no undertaking between the Raja and the East India Company at all, far less an undertaking to exempt him from the liability to pay a particular tax.

5. It is admitted before us that the Raja was paying a sum of Rs. 1,600 per annum to the Mahrattas, and although there is no clear finding by the Commissioner Mr. Jayaswal states that the East India Company issued instructions to Fateh Muhammad not to realise more. That act on the part of the Sovereign power does not show that the Raja of Parikud was the proprietor of a permanently settled estate.

6. The result is that the assessee cannot claim exemption from income-tax on account of *jalkar*.

7. The assessee fails and will pay the costs of this hearing. Hearing fee five gold mohurs.

SEN, J.—I agree.

[205] IN THE HIGH COURT OF JUDICATURE AT PATNA.

Before Mr. Justice Mullick, Kt., Ag. Chief Justice and Mr. Justice Sen.

[11th August, 1927.]

Brij Raj Rang Lal

Assessee.*

v.

The Commissioner of Income-tax, Behar and Orissa

Referring Officer.

Income-tax Act (XI of 1922), Ss. 22 (4), 23 (2), (3) and (4) and 37—Production of accounts before Income-tax Officer—Succeeding officer calling for them again—No express notice under Sec. 22 (4)—Default by assessee—Assessment under Sec. 23 (4), legality of—Jurisdiction to issue notice under Sec. 22 (4) after submission of return.

The assessee, carrying on business in Bargania, Sitamarhi and Bajpatti, filed a return of his income and in response to a notice under Sec. 23 (2) produced Bargania and Sitamarhi accounts. After repeated extensions of time for the production of the Bajpatti accounts, he produced them before a new Income-tax Officer who by that time had succeeded the Officer who had examined the other accounts. This new Officer directed the assessee by an order not expressed to be issued under any particular section of the Income-tax Act, to produce the Bargania and Sitamarhi accounts as well, as he was unable from the notes of these accounts left by his predecessor to estimate their income. On failure to produce these accounts again, the Officer made an assessment under Sec. 23 (4). The Commissioner held that the order of the Income-tax Officer calling for accounts again could be construed as a notice issued under Sec. 22 (4), though not so stated therein and that as the Income-tax Officer had power to call for the production of the accounts already produced before his predecessor, the assessment under Sec. 23 (4) was legal. On a reference to the High Court,

Held, that there being no notice expressly issued under Sec. 22 (4), the assessment was illegal.

Obiter.—A notice under Sec. 22 (4) calling for accounts or documents can be issued only before the filing of a return by an assessee and thereafter Ss. 23 (2), (3) and 37 give ample powers to the Income-tax Officer to call for whatever documents required by him.

Dhuni Chand Dhani Ram v. Commissioner of Income-tax, Punjab, 2 I.T.C. 188; *Pitta Ramaswamiah v. Commissioner of Income-tax, Madras*, 2 I.T.C. 196; Referred to.

Case [Miscellaneous Judicial Case No. 137 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bihar and Orissa for the opinion of the High Court.

CASE

Under section 66 (2) of the Indian Income-tax Act, the following questions of law are referred to the Hon'ble Judges of the High Court for decision.

(1) Whether assessment under section 23 (4) in this case is legal when no fresh notice under section 22 (4) was served after the new Income-tax Officer took over the case?

* (1927) 8 P. L. T. 689 : A. I. R. (1927) Pat. 390; 106 Ind. Cas. 193.

(2) Whether assessment under section 23 (4) is legal when admittedly all the account books were produced before either the former Income-tax Officer, or his successor?

2. The application for reference before me did not state explicitly what questions of law, if any, were involved and accordingly, at my request, the Vakil for the assessee on the date of hearing formulated the questions of law as stated above. The points at issue are perhaps not very clearly expressed, but a full statement of the facts of the case, will, it is hoped, enable the court to understand without difficulty what the questions in issue are.

3. The assessee in this case which is an unregistered firm in which there are two co-sharers, namely, Brij Raj and Rang Lal, carries on business at three places in the District of Muzaffarpur, namely, Bargania, Sitamarhi and Bajpatti. The return required by section 22 (2) of the Act was duly filed and on 11th May, 1925 a notice was issued on assessee under section 23 (2) directing him to appear on 22nd May 1925 with accounts and all other evidence in support of the return. Time was allowed on that date as well as on 12th June, 1925, at the request of the assessee, and the accounts were taken up and examined partially on 6th July, 1925 and 7th July, 1925. On these dates, however, the account books of the Bajpatti branch were not produced and the party was directed to produce them at camp Sitamarhi on 24th July, 1925. The party then explained that he could not produce the account books of the Bajpatti branch on the 24th, whereupon the then Income-tax Officer asked him to make every effort to produce them, noting that if he failed he would be given further time. On 24th July, 1925 the party did not produce the accounts of the Bajpatti branch and was allowed time till the 25th August. On that date, no one appeared on behalf of the assessee and on the 27th August a petition for time was filed and time allowed till the 18th September. On the 18th September again a petition for time was filed and time allowed till the 8th October. On this last date, the party again failed to produce the accounts of the Bajpatti branch, whereupon the then Income-tax Officer noted in the order sheet that assessment would be made under section 23 (4) on the 16th November. On this date the party sent a telegram from Sitamarhi reporting that he had appeared with his account books at the Dak bungalow of that place, apparently under the impression that the account books would be examined there though there is no direction to this effect in the order sheet. At any rate, time was allowed till the 17th December on which date the party was directed to produce all his accounts. Meanwhile, i.e., between 16th November 1925 and 17th December 1925, the Income-tax Officer was transferred and the new Income-tax Officer took over charge. On the 18th December, the party produced the accounts of the Bajpatti branch before the new Income-tax Officer who, on that date, directed the party to produce the accounts of the Sitamarhi and Bargania branches as well on 19th January 1926 as he was not able from the notes left by his predecessor to make an estimate of the income from these two branches. On 16th January 1926 assessee filed a petition stating that these account books could not be produced because they had been sent to Calcutta where a gomosta was in charge, the proprietor of the firm who ordinarily resides in Calcutta having gone to his home in Marwar. The Income-tax Officer insisted on the production of these accounts and fixed 2nd February 1926. Meanwhile, on 30th January 1926 another petition was filed making substantially the same excuses as were made in the petition of 16th January 1926 and accordingly on 8th February 1926 assessment was made by the Income-tax Officer under section 23 (4).

4. These are the facts of the case.

5. The first question of law raised is perhaps somewhat unhappily framed and the expression "no fresh notice under section 22 (4)" in that question cannot be taken as implying that a notice under that section and sub-section had been issued in the time of the former Income-tax Officer. The real question at issue in the mind of the assessee is whether the assessment is legal in view of the fact that no legal notice, as he claims, under section 22 (4) was issued after the new Income-tax Officer took over the case. This however, is based on the assumption that the order of 18th December 1925 cannot rightly be construed as a notice under section 22 (4). That order runs as follows :— "Accounts produced for Bajpatti only. He (that is, assessee) must produce the accounts of Sitamarhi and Bargania on 19th January 1926". This order has been signed by Rang Raj one of the partners in the firm and it is the contention of the assessee that this order is not legally a notice as required by section 22 (4). This contention the department does not accept. There is no statutory form of notice under that section. Any notice under the Act may be served on any member of a firm, while the provisions of section 63 (1), directing that a notice under this Act may be served either by post, or as if it were a summons issued by a court would appear from the wording itself to be permissive in character and not exhaustive of all legal methods of serving a notice. Further, the assessee cannot argue that he had not full knowledge of what was required of him, for it is clear from his petitions of 16th January 1926 and 30th January 1926 that he knew exactly the account books which he was required to produce and therefore he was in no way prejudiced by the procedure adopted. It is respectfully submitted, therefore, that due notice as required by section 22 (4) was given to the assessee and if this view is accepted, it would follow that the first question as formulated does not really arise.

6. The second question on which a reference is asked is whether assessment under section 23 (4) is legal when admittedly all his account books were produced before the former Income-tax Officer or his successor. This, however, would really seem to be a formulation of the first question from a slightly different point of view. The accounts of the Sitamarhi and Bargania branches in this case were produced before the former Income-tax Officer and the accounts of the Bajpatti branch before his successor, while, for reasons given above, the succeeding Income-tax Officer called for the accounts of the Sitamarhi and Bargania branches which had already been produced before his predecessor. In other words, the question would appear to be whether in view of the fact that the accounts of the Sitamarhi and Bargania branches had been produced before the former Income-tax Officer in response to a notice under section 23 (2), the succeeding Income-tax Officer could legally issue a notice subsequently under section 22 (4) calling for these same accounts. I can find no authority in the Act for the contention that the right of the Income-tax Officer is restricted to calling for accounts only once and if this view is correct, it follows that the Income-tax Officer can subsequently call for accounts under section 22 (4) which had originally been produced before him or his predecessor in response to a notice issued under section 23 (2). In this connection, I would respectfully invite the attention of the learned Judges to the remark of Walsh, acting Chief Justice in the Allahabad case of *In the matter of Messrs. Lachhman Dass Narayan Dass*, (1) where he observed as follows : "Sub-section (2) (of section 23) does not confine the Income-tax Officer to one notice and such further notice, if given, would become a notice under sub-section (2)".

7. The respectful contention of the Department, therefore, is that while it would have been more satisfactory if the former Income-tax Officer had recorded notes of the accounts of the Sitamarhi and Bargania branches in sufficient details to enable his successor to form an estimate of the profits from these branches, at the same time, no illegality has been committed by his successor in requiring the assessee under section 22 (4) to produce the accounts of these branches.

K. P. Jayaswal and S. P. Asthana, for the assessee.

G. M. Agarwalla, for the Crown.

JUDGMENT.

MULLICK, A. C. J. :—It is difficult to understand what is the special question of law upon which the Commissioner of Income-tax is asking for an opinion. It is not sufficient for an assessee to suggest to the Commissioner the questions of law. It is for the Commissioner to find the facts first and then to state the point of law which arises out of those facts and on which he desires our opinion. He may then, if he likes, give his own opinion on the case.

2. Both parties, however, have agreed before us to ask our opinion on the following question of law :—

“Is an assessment under section 23, cl. (4) of the Indian Income-tax Act valid in this case?”

3. The answer depends upon whether or not a breach of section 22 (4) was committed.

4. Accounts or documents can be called for by the Income-tax Officer under section 22 (4) after issue of notice and before the filing of the return.

5. After the filing of the return, sections 23 (2), 23 (3) and 37 give ample powers to the Income-tax Officer to call for whatever documents he requires.

6. The failure to comply with any of the notices under these sections does not authorise the Income-tax Officer to make a summary assessment to the best of his judgment under clause (4) of section 23.

7. This last-mentioned clause runs as follows :—

“If the principal officer of any company or any other person fails to make a return under sub-section (1) or sub-section (2) of section 22, as the case may be, or fails to comply with all the terms of a notice issued under sub-section (4) of the same section, or having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment.”

8. The words “or having made a return” would be quite unnecessary if they were not intended to be in sharp antithesis to the preceding words and to show that in the view of the legislature a notice under section 22 (4) concerns only the stage before the filing of a return. *Duni Chand Dhani Ram v. The Commissioner of Income-tax* (1) and *Pitta Ramaswami Iyer v. Commissioner of Income-tax, Madras*, (2) were cited. But it does not appear that the point was clearly raised and decided in these cases.

9. If then notice under section 22 (4) can only be issued before the filing of a return, there could have been no breach of a notice under this clause in the present case and the summary assessment was illegal.

(1) 2 I.T.C. 188.

(2) 2 I.T.C. 196.

10. This assumes that there was in fact a notice issued under section 22(4); but the finding of the Income-tax Commissioner on this point is not clear.

11. He thinks that the order entered on the order-sheet of the 18th December 1925 was sufficient to constitute a notice under section 22(4). But what is there to show that the notice was under this section? The notice might have been one under section 37 or 23 (3).

12. Therefore, even if we assume that notice under section 22 (4) can be issued after a return has been filed, such notice not having been issued in this case the summary assessment was illegal.

13. The assessee succeeds and will get the costs of this proceeding. Hearing fee five gold mohurs. He will be entitled to include in his costs his deposit of Rs. 100 but not for the printing of the paper book.

SEN, J.—I agree.

[206] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Mr. Justice Baguley.

[31st August, 1927].

Dr. R. N. Singha

Appellant (Plaintiff).*

v.

The Secretary of State for India in Council

Respondent (Defendant).

Income-tax Act (XI of 1922), Sec. 67—Assessment in default of return—Wrong description of assessee in notice calling for return—Assessment, if ultra vires or illegal—Suit for recovery of tax collected—Civil Court's Jurisdiction, Bar of—Sec. 67 if ultra vires of Indian Legislature.

One Dr. R. N. Singha who was served as "Proprietor, Bassein Pharmacy" with a notice under Sec. 22 (4) of the Income-tax Act submitted no return but merely sent back the return form. In default of return an assessment was made and the tax together with penalty for non-payment was collected from him. Thereupon he instituted the suit against the Secretary of State for recovery of the amounts collected, alleging that he not being the Proprietor but only the Manager of the Pharmacy was not the individual mentioned in the notice and hence was not bound to pay the assessed sums.

Held, (1) that as the wrong description as proprietor would not make the assessment *ultra vires* or wholly illegal, Sec. 67 of the Act was a bar to the institution of the suit:

(2) That in the absence of proof that a suit of this nature would have lain against the East India Company, Sec. 67 was not *ultra vires* of the Indian Legislature.

Haji Rahimtulla v. Secretary of State, 2 I.T.C. 118; *Secretary of State v. Forbes*, 1 I.T.C. 23; *Forbes v. Secretary of State*, 1 I.T.C. 8; considered.

Second Appeal No. 327 of 1927, decided on 31st August 1927.

Robertson, for Appellant.

A. Eggar (Government Advocate), for the Crown.

JUDGMENT.

The plaint in this case sets out that the Income-tax Officer of Bassein made assessment of income-tax on "one Dr. R. N. Singha, Proprietor, Bassein Pharmacy". Plaintiff states that he is not the man mentioned and refused to pay. Nevertheless, the Income-tax Officer proceeded to levy the amount of assessment and penalty for non-payment amounting in all to Rs. 1,745-11-0. Plaintiff has filed a suit against the Secretary of State for India in Council to recover this money, together with interest. The Trial Court held that under

section 67, Income-tax Act, no suit would lie. The plaintiff appealed to the District Court, but the appeal was summarily dismissed under O. 41, Rule 11. He now comes to the High Court in second appeal.

The facts as given in the plaint are somewhat scanty, but they have been amplified by appellant's advocate in argument.

It would appear that Mr. R. N. Singha is a medical practitioner. He bought a chemist's shop known as the Bassein Pharmacy and held it in his own name for a time. Afterwards he transferred it to his wife's name and for one or two years his wife paid income-tax on the income accruing from the business. It was after this that the present trouble arose. His contention is that he is Mr. R. N. Singha, Medical Practitioner of 18, Myenu Road and that he is not Dr. R. N. Singha, Proprietor, Bassein Pharmacy. He admits he has some connexion with the pharmacy, but is merely its supervisor or manager, and not its proprietor. His claim is that the assessment was made on the person whoever it was, who owned the Bassein Pharmacy and that as he is not that person the assessment cannot be made upon him.

On the other hand it is contended that the assessment was on Dr. R. N. Singha, and, although it is contended that he is the real proprietor, nevertheless that makes no difference. It was the individual R. N. Singha on whom the assessment was made and from whom the money was recovered and if he objected to the assessment he had his remedy under the Income-tax Act and no suit of this nature would lie, it being barred by section 67, Income-tax Act. It is further admitted that before the assessment was made a notice was served on him under the title of Dr. R. N. Singha, Proprietor, Bassein Pharmacy, calling for a return of his income under the Act. It is admitted that he sent the form back and never made any return, and the assessment made by the Income-tax Officer was made in default of any return from him. It is contended, first of all, that a suit for the return of the money would lie despite the provisions of section 67, Income-tax Act; and, secondly, it is contended that if section 67 does bar the suit, it is *ultra vires*. These are the two points that were argued in appeal although the second one does not appear to have been mentioned in the memorandum of appeal.

A large number of cases has been quoted, but most of them are only quoted by way of analogy and are not directly to the point. The appellant relies almost entirely upon *Haji Rahemtulla Haji Tar Mohamad v. Secretary of State*, (1). This is a case in which it was held that the provisions of section 39 of the former Indian Income-tax Act, corresponding to section 67, present Income-tax Act, had no application to a case where the assessment is clearly *ultra vires*. In that case the Income-tax Collector sought to assess a non-resident in British India on profits made by him at branches which were also outside British India and which were not received by him in British India. It was held that as the assessment was clearly *ultra vires* the provisions of section 39 did not apply. No reasons for the decision are detailed, but it must be regarded as a considered opinion of a Bench of the Bombay High Court. The ground for the assessment being *ultra vires* was that as income for purposes of the Income-tax Act must be income accruing or received within British India, the assessment of income which was not received and did not accrue in British India was outside the four corners of the Act.

The next case quoted by the appellant is *Secretary of State for India v. A. H. Forbes* (1). This, in a sense, is against the appellant. But there is this to be deduced in the appellant's favour from it. At the end of the judgment occur the words: "I am wholly unable to say that anything has been done *ultra vires* by the Collector. I, therefore, hold that the Civil Court had no jurisdiction over this question and that the suit cannot be maintained". From this can be deduced the opinion that had anything *ultra vires* been done the Court would have entertained the suit. The appellant has also quoted *Selmes v. Judge and another* (2) but I cannot see any principle in this case applicable to the present one. All that was held was that the defendants were entitled to notice of action. It was a case in which some surveyors of highways were sued for the return of money which it was held they had wrongfully levied. As I have no means of finding out what the powers of the Surveyors of Highways are, I am unable to see how this case helps the appellant in the present case. The question then is, is there anything, on the face of the plaint, to show that the Income-tax Officer has acted *ultra vires*? There was a business, the Bassein Pharmacy. Dr. R. N. Singha was obviously the man who had the management of it. As a medical practitioner, a professional man, one can understand that the Income-tax Officer had his eye upon him as a person whose income might be assessable to income-tax. He served a notice upon him. The notice was not addressed to the proprietor of the pharmacy. It was addressed to a certain individual who might, on the face of it, have regarded it as his. The fact that the word "proprietor" was placed after his name instead of "manager" was something not of vital importance. It may be a mere error of description and it cannot be contended that an error of description would be a good cause for refusing to make a return or for invalidating an assessment made. The whole case has been argued on the underlying fallacy that to give anything a particular name makes it acquire the characteristics of that name. Here was a man served with a notice calling on him to make a return. He made no return. The Income-tax Officer was then entitled under the Act to make an assessment upon him. To that assessment he had a right to dispute. But he did not dispute it in the way prescribed by law, and automatically notice of demand followed. It is argued that the Income-tax Officer acted *ultra vires* because he assessed Dr. R. N. Singha on the income arising from the pharmacy which was not his. It is argued that he had a right to assess Dr. R. N. Singha's income but to burden him with other income which he had not got and to make him pay on income which he did not receive was *ultra vires*. If this were the case every error which any Income-tax Officer makes in assessing any person must be *ultra vires* and the expressions "*ultra vires*" and "erroneous" are by no means synonymous.

There is one case which has come to my notice, though not mentioned in the argument, which seems to cast a flood of light on this sort of matter. It is *Forbes v. Secretary of State for India* (3). Here the appellant was the executor of an estate. The Collector called on him to pay tax on certain income accruing in respect of the estate. He objected. The objection was disallowed and so there was an appeal against the order disallowing it and ultimately Forbes filed a suit to recover the money paid, exactly as in the present case. The law applicable was the former Income-tax Act and the barring section

(1) 1 I.T.C. 23.

(2) (1871) L.R. 6 Q.B. 724.

(3) 1 I.T.C. 8.

was section 39. It was argued that section 39 was a bar to the suit. The Calcutta High Court found that the suit was barred. The head-note states. "It is the Collector's duty to determine what persons are chargeable in respect of sources of income other than salaries and pensions, profits of companies and interest on securities". The income sought to be charged in the present case is income of this description and it was the Collector's duty, now the duty of the Income-tax Officer, to determine what person was chargeable for it. In the body of the decision on page 10 occurs the passage : "I have also shown that the Collector has to determine that the plaintiff is a person chargeable and that in so doing he acted within the limits of his jurisdiction". That also fits the present case. The income chargeable was certainly income on which tax was leviable, for it was profits and those profits arose within British India so that the principle of the Bombay case referred to cannot be held to render the action of the Income-tax Officer totally invalid.

The Income-tax Act provides persons assessed with a remedy. They can apply to the Income-tax Officer to revise his assessment. They can appeal from his order to the Assistant Commissioner and from the Assistant Commissioner's order to the Commissioner, and they can call upon the Commissioner to refer the matter to the High Court ; or, if he refuses to do so, they can apply to the High Court to direct him to make a reference. This should provide all the safeguards necessary. There is a bar in section 67, as I have said before, and when an Act deals in a complete manner with any particular matter it is supposed to deal with it entirely, and, in this connexion, I would quote *Sheobaran Singh v. Kulsum-un-nissa* (1). This is a Privy Council case and on page 375, I find the *dictum* : "Now whenever a statute deals with certain rights it is easy to conclude that it deals with the total ambit of those rights and leaves nothing standing outside the provisions of the statute". In view of what I have said, and relying particularly upon the Calcutta case of *Forbes v. Secretary of State for India* (2) already mentioned, I would hold that section 67 bars the present case. It is, I note, a case for the recovery of money but that money has been taken, on the face of it, legally under an assessment made in due form. It is only contended that the assessment is erroneous ; so unless the assessment can be proved to be erroneous, the money is rightfully taken. I hold, therefore, that this case comes within the purview of section 67 ; for unless the assessment is set aside or modified no claim to the money or a refund of the money can be entertained.

There remains another question of whether section 67, Income-tax Act, is *ultra vires*. For this proposition section 32, Government of India Act, is relied upon. "Every person shall have the same remedies against the Secretary of State for India in Council as he might have had against the East India Company if the Government of India Act, 1858, had not been passed". The plaintiff would have therefore to show that a suit of this nature could have been filed by a private person against the East India Company prior to 1858. I believe that before 1858 there was no such thing as the income-tax, but I take it that if it is shown that a suit for the recovery of revenue wrongly assessed would have lain against the East India Company before 1858, then, by analogy, a suit for the recovery of income-tax wrongly assessed can now be entertained. The only case quoted to me on this point is the *Secretary of State for India v. J. Moment* (3). In this case the question was whether the Govern-

(1) (1927) 49 All. 367.

(2) 1 I.T.C. 8.

(3) I.L.R. 40 Cal. 391.

ment of India could make a law the effect of which was to debar a Civil Court from entertaining a claim against Government to any right over land. Their Lordships of the Privy Council were satisfied that land suits would have lain against the East India Company, and, therefore, it was held that the right to file such suits still survived against the Secretary of State for India. To prove that section 67 is *ultra vires*, the plaintiff has got to show that a suit of this nature for recovery of revenue paid would have lain against the East India Company. I have not been referred to any case in which this has been done.

The respondent cited one case, *Spooner v. Juddow* (1) to show that a case concerning revenue could not be filed in a Civil Court. But that was filed on the original side of the Supreme Court of Bombay which was specifically debarred from entertaining such suits by its Charter. This is no guidance. I must assume until the contrary is proved that an Act passed by the Indian Legislature is valid until and unless the contrary has been proved. The contrary has not been proved. Therefore, I must assume that it is right. For these reasons I dismiss the appeal with costs.

Appeal dismissed.

[207] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.

[5th September, 1927]

Messrs. Binny & Co., Ltd., (London) by Agents
Messrs. Binny & Co. Ltd., Madras

*Assessees.**

v.

The Commissioner of Income-tax, Madras

Referring Officer.

Income-tax Act (XI of 1922), Secs. 49 and 50—Application for United Kingdom double income-tax relief—Period of limitation therefor—"Tax was recovered" in Sec. 50, meaning of—"Recovered", if means relief granted in United Kingdom.

The words "tax was recovered" in Sec. 50 of the Income-tax Act means "tax was received by the Government" and in the case of an assessee applying for double income-tax relief under Sec. 49, those words mean "Indian income-tax was paid in India" and not "relief was obtained in the United Kingdom under Sec. 27 of the United Kingdom Finance Act, 1920."

Case [Referred Case No. 7 of 1926] stated under section 66 (1) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the Court.

CASE.

Under section 66 (1), I have the honour to refer for the opinion of the Hon'ble the Judges of the High Court the following question of law :

"What is the meaning of the words "tax was recovered" in section 50 of the Indian Income-tax Act? In the case of a Company which has made a direct payment of Indian income-tax on assessment and which is applying for double income-tax relief under section 49, do the words "tax was recovered" mean "Indian Income-tax was paid in India" or do they mean "relief was obtained in the United Kingdom under section 27 of the United Kingdom Finance Act, 1920" or "United Kingdom Income-tax was paid in the United Kingdom"."

* (1927) I.L.R. 50 Mad. 920 ; 53 M.L.J. 672 ; 26 L.W. 679 ; A.I.R. (1927) Mad. 1039 (1).

(1) 4 M. I. A. 353.

2. In my opinion the words "tax was recovered" mean "Indian Income-tax was paid in India". I am not certain what precise meaning is attached to the words "tax was recovered" by the petitioners. On receipt of their request for a reference to the High Court, I asked them to formulate the questions of law which they considered I ought to refer and to state on what precise ground they based their claim for a refund. In reply their Solicitors have sent me three questions which consist chiefly of arguments and which contain alternative grounds for the claim. I do not consider that the questions as drafted by the Solicitors are suitable for reference and I accordingly submit the question as framed in paragraph 1.

3. The facts of the case are that petitioners Messrs. Binny & Co. (London) were assessed to Indian Income-tax for the years 1922-23 and 1923-24 and 1924-25. The tax due for 1922-23 was paid finally in April 1923, that for 1923-24 in November 1923 and that for 1924-25 in September 1924. On 17th December 1924 Messrs. Binny & Co. obtained from the United Kingdom Revenue Authorities the certificate required by section 49 showing the rate of tax levied in the United Kingdom and the rate of relief obtained there. On 29th August 1925 they applied to the Income-tax Officer, First Circle, Madras, for the double income-tax relief from Indian Revenues for 1922-23 and on 4th September 1925 for the relief for 1923-24. For 1924-25 the application for relief was made on 8th September 1925. It was granted but relief for 1922-23 and 1923-24 was refused on the ground that the applications dated 29th August and 4th September were made more than one year after the last day of the year on which the taxes for 1922-23 and 1923-24 had been paid. In the view of the Income-tax Department the claims for these years should have been made before 31st March 1925. They were thus late by about 5 months.

4. As I have said, I am not clear on what grounds Messrs. Binny & Co. consider that their claims are not time-barred. In the correspondence which has taken place since their claim was refused they have set up various pleas ; (a) firstly they claim that there has been no unnecessary delay on their part. As the English assessments had been delayed they were only able to secure the English certificate in December 1924. After that the London Office, relying on a Resolution of the Indian Central Board of Revenue No. 1283 dated 28th April 1924 made a claim for the Indian refund to the High Commissioner for India in London. The London Office was informed by the High Commissioner that the claim had to be made in Madras. Its letter dated 29th July 1925 to this effect reached the Madras Office on 20th August and the claims were made as soon after that as possible. This explanation for the delay which occurred between December 1924 and March 1925 seems to me quite unacceptable. In any event it is a matter which does not involve any question of law. It will be observed that the Resolution of the Central Board of Revenue has nothing whatever to do with claims to refunds under section 49 of the Indian Income-tax Act. It relates solely to claims to refunds under section 48.

(b) Secondly Messrs. Binny & Co. have argued that according to the ordinary use of the word "recovery" in the sense of getting back something which one has paid, the words "tax was recovered" must mean "relief was obtained". While it is true that the word "recovery" in everyday use conveys the idea of getting back something which one has paid previously, it seems to me clearly that to adopt that meaning in section 50 would make that section nonsense. In the first place section 50 refers not only to section 49 but also to section 48. The words "tax was recovered" in section 50 must be so interpreted as to make them applicable both to refunds under section 48 and to refunds under section 49. However low an opinion one may hold of the draftsmen of Indian Acts, it is surely impossible to believe that they would have

enacted that a refund on a dividend under section 48 would be time-barred if it was not claimed within one year from the last day of the year in which the refund was made. Secondly it is quite clear that throughout the Indian Income-tax Act, "recovery" is used in the technical sense to mean collection—see for instance sections 18 (8), 44-A, 40, 41 and 68 second proviso. In all these sections "recovery" can bear no meaning except "collection". The technical term "recovery" is used instead of the plain word "collection", because Government may obtain the tax by various means, by actual direct collection on assessment, by deduction at source, and by indirect taxation such as a shareholder suffers. The word "collected" would not cover all these different methods by which revenue is credited to Government. Hence the necessity for the adoption of a wide expression such as "recovery". Lastly if the draftsmen of the Act had intended the words "tax was recovered" to have the meaning now suggested, they would surely have repeated the language of section 49 where a taxpayer who recovers tax already paid is described as having "obtained relief". Section 50 would then have run "No claim to any refund of income-tax under this Chapter shall be allowed, unless it is made within one year from the last day of the year in which relief was obtained under section 27 of the Finance Act, 1920." A separate sub-section would also have been inserted to impose a time limit on the operation of section 48.

(c) Thirdly, it has been contended that if "tax was recovered" means "tax was collected" it must mean "tax was collected in the United Kingdom". This interpretation of section 50 seems to me no less impossible than the one discussed above. The word "tax" at the end of section 50 must refer to the same tax as that mentioned at the beginning of the section, i.e. to the Indian tax. The refund that is to be given in India is a refund of Indian Income-tax and India obviously cannot refund a tax which it did not collect.

5. The only real basis for the claim of Messrs. Binny & Co. is that implied in the third question formulated by their lawyers Messrs. Morseby & Co. viz, that my interpretation of section 50 may render the agreement for double income-tax relief inoperative. Of course it renders the agreement inoperative in certain cases. Section 50 was intended to have this effect and I can see nothing unreasonable in the Legislature which was giving a concession, laying down conditions for the grant of that concession. Just as the Legislature said in section 49 that the rate of relief to be given in India shall not exceed half the Indian rate so they said that claims must be made within one year. If my interpretation of section 50, which I claim is the natural and obvious one, made it practically impossible for any one ever to obtain double income-tax relief in India, I would agree that an alternative interpretation that obviated this result without doing violence to the language of the statute would be preferable. But that this is not the case is proved by these facts : (1) that in the three years since the arrangement came into force we have in Madras dealt with 22 applications, given refunds amounting to nearly Rs. 6 lakhs in 18 cases and only rejected 4 cases, including the two now under consideration as time-barred.

(ii) that if Messrs. Binny & Co., had made a previous study of the Act and if they had not misread Central Board of Revenue Circular No. 1283 dated 28th April 1924, they would have had 3½ months in which to submit their claim after they received the certificates from the United Kingdom Revenue Authorities.

6. I may add that both the interpretations suggested by Messrs. Binny & Co. are inconsistent with the ruling given by the Bombay High Court in *Amritlal K. Gandhi v. Commissioner of Income-tax, Bombay* (1) in which on

a reference regarding refund of dividends the Court passed the following order :
“The Court is of opinion that income-tax is “recovered” when the dividend is paid.”

Vere Mockett, Counsel instructed by Messrs. *Moresby & Co.*, Attorneys,
for the assessees.

M. Patanjali Sastri, Counsel for the Crown.

JUDGMENT.

What we are asked to determine is the meaning of the words “tax was recovered” in section 50 of the Indian Income-tax Act. It is contended by the assessee that the word “recovered” which ordinarily has the meaning of taking back must refer to the repayment of tax in the United Kingdom referred to in section 49 and that the words “tax was recovered” must be read as meaning tax was refunded to the assessee under the provisions of section 27 of the Finance Act of 1920. Unfortunately for this contention we see that section 50 is applicable not only to section 49 but also to section 48; and if we are to apply this meaning of the word “recovered” to section 48, it would mean that when a person had obtained a refund under section 48 he is given under section 50 another year within which to apply for that same refund. This certainly makes nonsense of these two sections. The word “recovered” does not necessarily mean the actual taking back of what has been given, as is obvious from its use throughout the Income-tax Act. In section 18 (8) which deals with “deduction” of tax in advance, it is observed that “the power to levy by deduction under this section shall be without prejudice to any other mode of recovery,” implying thereby that deduction is one mode of recovery. Similarly, under section 41 tax is “recoverable” from the Court of Wards, Administrator General, etc., and there it does not mean taken back. It is suggested that tax can only be “recovered” by coercive process. The Act does not provide for recovery by coercive process but even then there is no taking back of what has been given any more than when the tax is received by voluntary payment. Possibly, there is an implication in the word “recover” that the tax is a sum which has to be deducted out of the income as really belonging to Government, and in that sense the word “recovered” would bear the meaning of taking back. Section 44 (a) is also a very strong argument against the assessee’s contention as to the meaning of the word “recovered”. We are therefore satisfied that the words “tax was recovered” mean “tax was received by the Government”.

It has been pointed out to us that this interpretation may cause hardship in individual cases where there has been delay on the part of the Income-tax authorities in England in making the refund there, such delay not being due to the default of the assessee. We would point out that this hardship can only be obviated by an amendment of section 50 and we are of opinion that this should be done by giving the Income-tax Commissioner power to extend the time in suitable cases.

The petitioner will pay the costs of this application, i.e., counsel’s fee Rs. 250.

[208] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir William Phillips, Kt., Offg. Chief Justice, Mr. Justice Ramesam
and Mr. Justice Beasley.

[5th September, 1927.]

Yagappa Nadar

Assessee.*

v.

The Commissioner of Income-tax, Madras

Referring Officer.

Income-tax Act (XI of 1922), Sec. 2 (1)—Income derived from toddy—When 'agricultural income' as defined in Sec. 2 (1).

Income derived from toddy is agricultural income within the meaning of Sec. 2 (1) of the Income-tax Act when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income.

Case [Referred Case No. 16 of 1926] stated under section 66 of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following question: "Whether toddy extracted from cocoanut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of section 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy."

2. As the question is a general one it is unnecessary for the purposes of this reference to deal with the facts of this particular case.

3. It is perhaps advisable to give a brief description of the system under which the toddy revenue is administered in the Madras Presidency. The production and sale of toddy without special license is forbidden. Sale is restricted to a certain number of shops, a list of which is published in the local Gazette some three months prior to the commencement of the lease year. The right to sell toddy in these shops is then put up to auction and sold for each individual shop to the highest bidder. This right carries with it the right to tap subject to the payment of the tree tax, a certain number of trees,—palmyrah, date or cocoanut for toddy and to transport that toddy from the tope to the shop. Nobody except the shop licensee may draw fermented toddy from any of these palm trees but a tree may be tapped for unfermented toddy in specially prepared lime coated pots. After having his bid confirmed by the Land Revenue Officers and his license issued to him, the shopholder has to make his own arrangements to secure trees from which to draw his supply of toddy. Having selected his trees, he pays the owner of the trees certain fees called *moturpha* and pays tree tax to Government. This tree tax varies from district to district and is about Rs. 4 or 5 for a cocoanut tree and Rs. 3 to 4 for a palmyrah. The trees are then marked by the local Excise Sub-Inspector, license for tapping and license to transport being issued immediately by the Inspector. The toddy is transported to the shops in pots containing about 3 gallons and is sold there by bottles or in small measured mud pots. The profits from the business of toddy selling consist of the difference between the total receipts at the shop and the expenses, viz, the shop kist, tree tax, *moturpha* paid to the tree owners and such miscellaneous expenses as wages to the shop-sellers, tappers, cost of transport, etc.

* (1927) I.L.R. 50 Mad. 923; 53 M.L.J. 666; 26 L.W. 578; A.I.R. 1927 Mad. 1038.

4. As the present assessee claims that these profits are agricultural income he has asked me to refer the above question for Your Lordships' opinion. In my opinion the answer to the question must be that income derived from the sale of toddy is not agricultural income and that the Income-tax Act applies to it. The income, i.e., *moturpha* fees, obtained by the tree owners by leasing out the right to draw toddy is agricultural income because it is derived from the cultivation of trees and no attempt is made to tax it. The income earned by an outside contractor who exploits the trees for the manufacture and sale of toddy on a commercial basis seems to stand on an entirely different footing. Such income is earned by a business venture and can in no sense be regarded as the result of agricultural operations. The ordinary produce of a cocoanut tree is its fruit and the extraction of a special product like toddy is an industrial operation in much the same way as is the manufacture of alcohol from sugar-cane or from rice. Further the Excise law does not permit the extraction of toddy by the ordinary cultivator. I am therefore of opinion that the income derived from the manufacture and sale of toddy is income derived from "business" as defined by section 2 (4) of the Income-tax Act and that the exemption granted by section 4 (3) (viii) of the Act does not apply to it.

K. S. Jayarama Iyer, for assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The question referred by the Income-tax Commissioner is "whether toddy extracted from cocoanut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of section 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy".

It is contended for the petitioner that he as lessee of the trees is entitled to treat the income derived from the toddy which is produced from these trees as agricultural income. The juice which by contact with air in time becomes toddy is product of these cocoanut trees and it is contended that as such it is an agricultural product. That undoubtedly is so, and the income derived therefrom by the person who has produced that product by agricultural operations would be agricultural income; but it does not at all follow that if he sells the juice to another person and that person makes an income by again selling that product, that the latter income is agricultural income. Ordinarily, it would certainly not be agricultural income unless it could be shown that the second seller had obtained his income by agriculture, that is to say, he must show that he has either as owner or as lessee done some agricultural operation by reason of which he becomes possessed of the toddy and therefore is entitled to treat the proceeds as income from agriculture. It is contended here that the petitioner is the lessee of the trees, but admittedly not of the land on which they stand. It is very doubtful whether it is possible to have a lease of the trees without the land on which they stand. Under the Transfer of Property Act leases are only in respect of immoveable property and no instance of a lease of moveable property has been suggested. No interest in the land has been transferred here and it would appear that what the petitioner has obtained is a mere license to tap the trees and draw the juice. If that be so, the mere fact that he has to water the trees (and that is not proved to be the case) shows only that the watering is one of the conditions of his license and not an act whereby the agricultural produce has been raised, for that was raised before he obtained his license. As the facts of the case have not been put before us by the Commissioner, we must give a general answer as follows:—"Income derived from toddy is agricultural income when it is received by the actual cultivator, whether

owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income within the meaning of the Act." Counsel's fee Rs. 250, will be paid according to the result of the disposal of the petition.

[209] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir William Phillips Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.

[6th September, 1927]

Mohideen Sahib, Bellary

.. Assessec.*

v.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 3 and 10—Association of individuals taking toddy shop licenses individually—Agreement to work the shops and share profits jointly—If illegal association—Assessment on combined profits, legality of.

A body of individuals who have agreed to take in auction, work and share the profits from four toddy shops licensed in individual member's name is not an illegal association, in the absence of proof of transfer or sub-renting by the license holders and consequently the association can be assessed to income-tax under Sec. 3 of the Income-tax Act on the combined profits of the four shops.

Case [Referred Case No. 21 of 1925] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Indian Income-tax Act, XI of 1922, I have the honour to refer the following question of law for the decision of the Hon'ble the Judges of the High Court :—"Whether a body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under section 3 of the Indian Income-tax Act on the combined profits of the four shops."

2. The facts of this case are as follows : For some time there has existed in Bellary district an association of individuals who have habitually secured control over certain toddy shops. The toddy shops in question are Adoni shops Nos. I, II and III and Basapuram shop. This association at the annual auction sales has taken the lease of these shops in the names of various individuals and has then arranged to finance the working of the shops and to divide the profits therefrom. The members of the association for the lease year ending 30th September 1922 were :

		Share.
1.	Roshan Chinna Manulla Hussain Sahib, Adoni ..	0-2-6
2.	N. Raghavendra Rao, Adoni ..	0-2-6
3.	Ediga Dariappa, Adoni ..	0-2-3
4.	Nakhate Narayana Rao, Adoni ..	0-0-6
5.	Ediga Pesalakanda Narasingappa ..	0-0-3
	Mohideen Sahib, Bellary	
6.	{ J. Mariappa, Bellary	
	{ K. Basappa, Bellary	.. 0-8-0
	{ Balasundaram Mudaliar, Adoni	
	{ Bada Batcha Sahib, Bellary	

* (1927)-53 M.L.J. 719; 26 L.W. 655; A.I.R. (1927) Mad. 1052.

In that year Adoni Toddy Shop No. I was taken in the name of K. Basappa, Shop No. II in the name of Arumuga Mudaliar, Shop No. III in the name of N. Raghavendra Rao and Basapuram shop in the name of Kuppuswami Nayaker. For the year ending 30th September, 1923 the account year now in question the members of the partnership were :—

	Shares.
1. Roshan Chinna Manulla Hussain Sahib	0-1-9 $\frac{3}{4}$
2. N. Raghavendra Rao	0-1-9 $\frac{3}{4}$
3. Ediga Dariappa	0-1-9 $\frac{3}{4}$
4. Nakhate Narayana Rao, Adoni	0-0-6
5. Ediga Pesalakanda Narasingappa	0-0-3
6. G. Aiyappa	0-1-9 $\frac{3}{4}$
7. D. Mohideen Sahib and others of Bellary	0-8-0

In this year the association took the shops as follows :—Adoni town shop No. I in the name of N. Narayana Rao, No. II in the name of Begala Ganga Reddi, No. III in the name of Dabbara Seshappa and the Basapuram shop in the name of Narasayya. Partner No. I, Roshan Chinna Manulla Hussain Sahib stood surety for the kists due on Adoni shop No. II. Adoni shop No. III was after the sale formally transferred to the name of Mohideen Sahib. Common accounts were maintained for the partnership and were actually produced in connection with a proposed assessment of the association in the year 1923-24. They were withheld during the assessment proceedings of the year under dispute, i.e., 1924-25 though there is clear evidence that they did exist. In the year 1923-24 the Collector proposed to tax the combine on the total profits made from the shops. The existence of the combine was then admitted by several of its members and the accounts relating to its working were produced but on the representation of the pleaders for the individuals who had formed the combine that there could not be a legal partnership under the Abkari Act, the Collector dropped his proposal to make a joint assessment in that year and confined himself to assessing profits made by the individual members of the combine. In 1924-25 the Collector came to the conclusion that his former view had been wrong and issued a notice to the members of the combine proposing a joint assessment. In his assessment order he has detailed the reasons which led him to believe in the existence of the combine. I have confirmed this finding of fact on appeal. Relying on the statement by one of the partners N. Narayana Rao from his share of half an anna he had obtained Rs. 1,408 and relying also on the accounts of the Abkari department the Collector estimated the profits of the combine at Rs. 50,000 and assessed it accordingly. Petitions under section 27 were filed before the Income-tax Officer and an appeal was then filed before me. After hearing the pleaders for the assesseees I held that the existence of the association had been proved and that its profits were legally liable to taxation. D. Mohideen Sahib having put an application under section 66 (2) I refer the question of law set out in paragraph (1) for the opinion of the High Court.

3. It was argued before me during the appeal and the application for a reference that a firm or association which has agreed to divide the profits from toddy shops, which had not been leased to the firm or association as such, was illegal as it contravened the provisions of Rule 27 of the general conditions applicable to all abkari and opium licenses. Various decisions were quoted in support of this view, viz., 24 Madras page 405, 26 Madras page 410 and 35 Madras page 582. Rule 27 of the general conditions reads : "No privilege of supply or vend shall be sold, transferred, or sub-rented without the Collector's previous permission nor, if the Collector so orders, shall any agent

be appointed for the management of any such privilege without his approval". The second part of this rule is inapplicable to the present case because the Collector of Bellary has not issued any orders to the effect that an agent shall not be appointed in toddy shops in the Bellary district. I take it that the law as laid down in the Madras decisions quoted above is final but in my opinion the legality or illegality of the agreement under which the profits of the four toddy shops are shared has no bearing on the question of the liability of the association to income-tax. The Indian Income-tax Act is concerned only with the taxation of profits however they are made irrespective of the question whether the transaction or transactions out of which the profits arise are such as to give rise to valid mutual rights and obligations between the parties thereto. The fact that the agreement between the partners of this firm or the members of this association cannot be enforced in a Court of law seems to me to supply no reason why the firm or the association should not pay its share of the profits of the business to the Crown. I am therefore of opinion that the question referred should be answered in the affirmative.

T. R. Ramachandra Ayyar, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

OFFG. CHIEF JUSTICE.—The question referred is, "whether a body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under section 3 of the Income-tax Act, on the combined profits of the four shops".

The Income-tax Commissioner finds that there was a body of seven persons who formed a sort of partnership. Of these seven persons, four bid and obtained leases of four toddy shops, and the profits from those four toddy shops were shared between the seven persons; apparently also all the seven assisted in the working and financing of those shops. On this finding he holds that this association of persons was not an illegal association under the Abkari Rules. Here the petitioner's vakil questions that finding and contends that his client and others have offended against the law in that they have contravened the provisions of Rule 27 of the general conditions of those licenses, viz., "No privilege of supply or vend shall be sold, transferred or sub-rented without Collector's previous permission". There is no evidence that the license-holders have either sold, transferred or sub-rented the shops which they have taken on lease. It is not, therefore, apparent how that rule has been contravened and, certainly we cannot presume illegality in the absence of any evidence of such illegality.

The answer, therefore, to the question must be in the affirmative. Costs (including Counsel's fee) Rs. 250 to be paid by the petitioner.

[210] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Guy Rutledge, Kt., Chief Justice, Mr. Justice Carr and Mr. Justice Das.

[6th September 1927.]

V.D.M.R.M. Ramanathan Chettiar

.. Assessee.

v.

The Commissioner of Income-tax, Burma

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 22 (2), 63 (1) and (2)—Hindu joint family carrying on business through agent—Service of notice under Sec. 22 (2) on agent—If good service—Provisions of Sec. 63 (2), if mandatory.

Where the assessee is a Hindu undivided family residing in Madras Presidency and carrying on business in Rangoon through an agent, the service of the notice under Sec. 22 (2) of the Income-tax Act on the agent in Rangoon is good service.

Having regard to the use of the word 'may' and not of the mandatory word 'shall' in Sec. 63 (2), the mode of service specified therein is not the only method by which a joint Hindu family can be served with notices.

Case [Civil Reference 6 of 1927] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

1. This is a reference made under section 66 (2) of the Indian Income-tax Act (XI of 1922), on the application of the Hindu undivided family of Chettyars which carries on business in Rangoon under the vilasam V.D.M. R.M. The reference arises out of the assessment of 1925-26, which was made by the Income-tax Officer, Chettyars' Circle, Rangoon. The proprietors live in Puduvayal in the Madras Presidency. The business at Rangoon is managed by an agent. The agent during the whole course of the assessment of 1925-26 and up to the present is one Ramaswami Pillai. In addition to their family business at Rangoon, the assessee had also the following sources of income:—

Property (dwelling house) at Puduvayal in Karaikudi Circle, Madras Presidency.

Share in a firm at Pazundaoung (Rangoon) in Burma.

Share in a firm at Gyobingauk in Tharrawaddy District in Burma.

Share in a firm at Seramban outside British India.

The family had therefore to be assessed at their principal place of business at Rangoon at the rate applicable to their total income from all sources and places.

2. For the assessment of 1925-26, a notice under section 22 (2) of the Act (Forms 10 and 11) was sent to the Rangoon agent calling for a return of income for the Rangoon business only. As regards the assessee's other sources of income requisitions were issued to the Income-tax Officers of Karaikudi and Tharrawaddy. The Income-tax Officer, Karaikudi, issued a separate notice (Forms 10 and 11) to the assessee regarding their non-Burma income. The notice intended for the assessee's Rangoon business was addressed "M.R.Ry. V.D.M.R.M. Ramaswami Pillai, 81, Mogul Street, Rangoon" and was acknowledged by Ramaswami Pillai in person on 16-5-25. It is admitted that Ramaswami Pillai is the assessee's duly constituted agent and that the notice under section 22 (2) was duly served on him. No return of income was submitted so far as the Rangoon business was concerned.

The assessee, however, returned Form 11 in response to the notice issued by the Income-tax Officer, Karaikudi. A notice under section 22 (4) was subsequently issued to the Rangoon agent requiring him to produce the accounts of the business on the 29th July 1925. The agent caused the unclosed accounts of the Rangoon business to be produced on that date. After examination of the unclosed accounts and on receipt of replies from the Income-tax Officers of Karaikudi and Tharrawaddy, the assessment order was passed on 3-3-26. As no return of income was filed for the Rangoon business, the Income-tax Officer, as he was bound to do in accordance with the express mandatory provisions of the law, made the assessment under section 23 (4).

3. Later an application for the reopening of the assessment under the provisions of sections 27 and 35 of the Act was presented to the Income-tax Officer. Among the grounds stated in the application was the following: "that

the assessee being a Hindu undivided family the service of the notice calling for a return of income could not legally be made on the agent at Rangoon, and, therefore, the whole assessment was bad in law." The Income-tax Officer found that the application disclosed no ground for either reopening the assessment under section 27 or for taking action under section 35, and dismissed it. Thereupon the assessee appealed to the Assistant Commissioner against his order. Three grounds of appeal were put forward. But the Assistant Commissioner's order shows that all were abandoned except that stated above, *viz.*, that the service of the notice on the Rangoon agent under section 22 (2) was invalid. The Assistant Commissioner decided this point against the appellants.

4. Thereafter an application under section 66 (2) of the Income-tax Act was presented to me, asking me to refer three questions of law. In my order on the application I refused to refer two of the questions, which do not arise out of the Assistant Commissioner's order under section 31. The third question of law now referred to is that raised and persisted in before the Assistant Commissioner. That question is as follows :—

The assessee being a Hindu undivided family residing in the Madras Presidency and carrying on business in Rangoon through an agent, was the service on the agent of the notice under section 22 (2) of the Income-tax Act good service ?

5. The arguments put forward by the assessee are stated in the petitions C and D. annexed hereto of V.D.M.R.M. Ramanathan Chettiar, of Pudukkottai. The contention is that the authority of the agent of the V.D.M.R.M. firm at Rangoon did not extend to his receiving income-tax notices on behalf of the undivided family; and that there was consequently no notice served on the family and no failure to furnish a return such as would have justified action being taken under section 23 (4). A further contention is raised that Order V, Rule 13 of the Civil Procedure Code permitting service on the agent residing within the jurisdiction does not apply to this case because the Rule is, in terms, applicable only to "suits"; and that the proper mode of service is by sending the summons to be served in the Province in which the assessee resides, as provided by section 28 of the Code and Order V, Rules 21 and 23.

6. My opinion on the question is as follows :—

(a) Section 63, sub-section (1), of the Income-tax Act permits service of notices to be made in any of the ways permitted by the Civil Procedure Code, and incorporates all the provisions of that Code as to service, whether they relate to suits or other proceedings.

(b) A notice addressed to a Chettiar firm doing business by an Agent in Rangoon, may be served under Order V, Rule 13, or Order XXX, Rule 3, on the resident manager or agent.

(c) These general powers of serving notices are not intended to be cut down by sub-section (2), which would be redundant if it related to the mode of service.

(d) Sub-section (2) merely allows a notice affecting a firm, family or association to be addressed to a particular individual in order to fasten upon him the personal responsibility for complying with the notice.

7. I therefore make the reference in the terms stated in paragraph 4.

Tambe, for the assessee.

Farar (Government Advocate) for the Crown.

JUDGMENT.

THE CHIEF JUSTICE.—The question referred in this case is as follows :—

“The assessees being a Hindu undivided family residing in the Madras Presidency and carrying on business in Rangoon through an agent, was the service on the agent of the notice under section 22 (2) of the Indian Income-tax Act a good service?”

The question turns upon the construction of section 63 of the Indian Income-tax Act. That section runs as follows :—

“63. (1) A notice or requisition may be served on the person therein named either by post or as if it were a summons issued by a Court under the Code of Civil Procedure, 1908.

(2) Any such notice or requisition may in the case of a firm or a Hindu undivided family be addressed to any member of the family, or to the manager or any adult male member of the family, and in the case of any other association of individuals be addressed to the principal officer thereof.”

It is admitted on behalf of the respondent firm that a notice on the agent would be a perfectly valid notice under sub-section (1), but it is contended that as a special provision has been made for service on a joint Hindu family by sub-section (2), this special provision excludes the operation of sub-section (1) as regards service of notice on such a family, and that the summons should be served in accordance with section 28 of the Code of Civil Procedure and Order 5, Rule 21.

In my opinion the Commissioner's view is correct. If it had been the intention of the Legislature to have prescribed section 63 (2) as the only method by which a joint Hindu family could be served, they would not in my opinion have used the word “may” but the mandatory word “shall”. And, with regard to the argument that the sub-section on this reading is unnecessary and surplusage, there is force in the Commissioner's argument that the intention was to fasten the firm with personal responsibility, so that, if necessary, the penal provisions of section 51 could be applied.

I would accordingly answer the reference in the affirmative. As the firm have failed in their contention, they should pay the Commissioner's costs, seven gold mohurs.

CARR, J :—I concur.

DAS, J :—I concur.

[211] IN THE HIGH COURT OF JUDICATURE AT RANGOON.

Before Sir Guy Rutledge, Kt., Chief Justice, Mr. Justice Carr and Mr. Justice Das.

[6th September 1927.]

A. R. A. N. Chettiyar Firm

.. Assessees.

v.

The Commissioner of Income-tax, Burma

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 22 (2), 23 (4) and 66—Assessee sending return form stating estimate income—Details prescribed therein not given—If a proper return within Sec. 22 (2)—Assessment under Sec. 23 (4), if justified—Reference on legality of assessment—Jurisdiction of the High Court.

Where an assessee sent a return of his income on the prescribed Form No. 11 stating under head 5 "Profits or income in money-lending business about Rs. 5,000" without giving the details required by the said form under Note 5, the said form cannot be considered as a return within the meaning of Sec. 22 (2) of the Income-tax Act and consequently an assessment under Sec. 23 (4) for failure to make a return is justified.

On a preliminary objection raised at the hearing of the reference in this case that as under Sec. 30 (1) no appeal lay against the assessment, the Court had no jurisdiction.

Held, overruling the objection, that it would not be in the interests of justice so to construe Sec. 30 (1) as to prevent the High Court from enquiring into the case whether the Income-tax authorities had acted legally in assessing under Sec. 23 (4).

Case [Civil Reference No. 5 of 1927] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Burma, for the opinion of the High Court.

CASE.

This is a reference made under section 66, sub-section (2), of the Indian Income-tax Act, 1922, on the application of the assessee, a Chettyar firm carrying on money-lending business at Paungde, and Thegon in the Prome District under the vilasam A.R.A.N. For the determination of the point of law to be referred, it will be sufficient to deal with the return for the Paungde business.

The return of income filed by the assessee was on the prescribed form I.T. No. 11 but consisted merely of a statement of the approximate amount of income without furnishing the particulars prescribed. Exhibit A annexed hereto is a copy of the return as the same was filed by the assessee stating merely "Profits or income in money-lending business about Rs. 5,000 (Rupees five thousand)."

The Income-tax Officer issued a notice to the assessee under section 22 (4) for the production of accounts and subsequently called for the agency accounts of the preceding year. These accounts were not produced and the Income-tax Officer at length made the assessment under section 23 (4) on the two grounds that the accounts were not produced and that the return was not a valid return.

The assessee applied for the re-opening of the assessment under section 27 and this was refused. The assessee appealed against this order of refusal, and the appeal was dismissed on the ground that the filing of the return in the manner stated was a failure to make a return within the meaning of sub-section (4) of section 23, the Assistant Commissioner holding that the failure to produce the accounts could not be relied on as a ground because the order to produce the accounts was merely verbal.

Copies of the several orders made herein are annexed hereto and marked B, C and D.

The assessee has applied to me to refer to the High Court of Judicature at Rangoon, the following question of law arising out of the appellate order mentioned, namely :—

"Whether a return of income on the prescribed Form No. 11 stating merely an estimated total income without the details required by the said Form, is a failure to make a return justifying assessment being made under sub-section (4) of section 23 of the Indian Income-tax Act, 1922?"

The application of the assessee is annexed hereto and marked E. From this it may be seen that the assessee claims that the failure to comply with the requirements of the Form as to the details of income is not

so material as to render the return invalid, and these requirements are only instructions to the assessee as to how he is to compute his income.

In my opinion, the completion of the Form in the manner required is an essential prescribed by law for the purpose of exhibiting to the Income-tax Officer the legal basis of the computation of the income. The binding nature of the instructions on the form may be traced to section 22 (2), section 59, Rule 19, Form 10, (para. 4).

In my opinion, a Form which is not completed in accordance with the legal requirements may be treated as no return, and the Income-tax Officer was justified in acting under section 23 (4) for this reason.

The assessee claims that the Officer should have acted under section 23 (3) treating the return merely as incorrect or incomplete.

I therefore refer the point of law stated above.

Daniel, for the assessee.

Eggar (Government Advocate) for the Crown.

JUDGMENT.

THE CHIEF JUSTICE.—A preliminary submission was made by the learned Government Advocate that no appeal lay and that the Court had no jurisdiction. He admitted that this ground had not been taken by the Commissioner of Income-tax, who, in fact, made the reference. We stated that in order to determine whether the objection was valid, we would have to consider the facts in both cases.

With regard to the first reference, the firm carried on business at Paungde and Thegon in Prome District. They made a return on the prescribed Form Ex. A under Head 5 "Business, Trade, etc. Profits or income in money-lending business about Rs. 3,000." None of the details required under Note 5 at page 2-3 of the form were given and the Income-tax authorities treated the return as no return at all and ultimately made the assessment under section 23 (4) of the Income-tax Act.

For the assessee it is argued that though defective the return cannot be treated as a nullity and that the details required in the form are only instructions to the assessee as to how he should fill up the form.

I am clearly of opinion that the particulars prescribed by the form are laid down in the Act itself [section 22 (2)]. Statutory Rule 19 embodies the form of return (Exh. A) furnished to the respondent. This rule has the same statute force as a section in the Act and a return which completely ignores its provisions cannot, in my opinion, be considered as any return.

The appellant relied on *Pitta Ramaswamiah v. Commissioner of Income-tax, Madras*, (1). This case cannot help him as I have not the form which the assessee filled up in that case and the Court decided that the assessment in fact had been made under section 23 (3) and not under section 23 (4).

For these reasons I would answer the question referred in the affirmative.

That being my finding, I shall now consider the preliminary objection. Though the Income-tax authorities have in my judgment rightly assessed the firm under section 23 (4) of the Indian Income-tax Act, the question at

issue was whether they had rightly done so, and the Commissioner was justified in referring that objection to this Court for a ruling. It would not be in the interests of justice to put such a construction on the proviso to section 30 (1) as to prevent this Court from enquiring into the case submitted whether the Income-tax authorities had acted legally in assessing under section 23 (4). As the firm has failed in its contention, I would direct them to pay the Commissioner's costs, seven gold mohurs.

CARR, J.—I concur.

DAS, J.—I concur.

[212] IN THE CHIEF COURT OF OUDH.

Before Mr. Stuart, Chief Justice and Mr. Justice Raja.

[16th September 1927.]

Gobind Saran and another

.. Assessee.*

v.

The Commissioner of Income-tax, United Province.

Income-tax Act (XI of 1922), Secs. 66 (3), 25 and 35—Assessment on income returned by assessee—Death of assessee before payment of tax—Application by deceased's brothers for rectification on basis of actual income for assessment year—Commissioner refusing to take action, as application not made by "assessee"—Application under sec. 66 (3) for stating a case—Jurisdiction of the High Court.

The assessee, a practising lawyer, whose return for the assessment year 1926-27 mainly made up of professional income, was accepted by the Income-tax Officer, was directed to pay the tax thereon on or before the 27th July 1926. On his death on the 22nd July 1926 without paying the tax, the Income-tax Officer claimed payment from the brothers of the deceased. Thereupon the brothers applied to the Commissioner of Income-tax under Sec. 25 of the Act for an account to be taken of the actual income of the deceased during the assessment year, 1st April 1926—31st March 1927 and for rectification of the assessment in accordance therewith. The Commissioner refused to take any action on the ground that the applicants were not "assessee" as defined in the Income-tax Act.

On an application under Sec. 66 (3) for directing the Commissioner to state a case on the question of the meaning of the word "assessee".

Held, that there being no order under Sec. 31 or Sec. 32 in respect of which there was a refusal by the Commissioner to state a case on an application under Sec. 66 (2), the High Court had no jurisdiction under Sec. 66 (3) to order the Commissioner to state the case.

Application [Civil Miscellaneous Application No. 433 of 1927] under section 66 (3) of the Income-tax (XI of 1922) for an order directing the Commissioner of Income-tax, United Provinces, to state a case for the opinion of the High Court.

H. D. Chandra, for the assessee.

G. H. Thomas, for the Crown.

JUDGMENT.

This is an application which purports to be under the provisions of section 66 (3), Act XI of 1922 (the Indian Income-tax Act).

The facts are as follows: A practising member of the legal profession of Gonda, Rai Sarju Prasad Sahab, furnished to the Income-tax Officer on the 1st May, 1926, a return of his estimated income for the financial year 1926-1927

* (1927) 1 Lucknow, 499; A. I. R. 1927 Oudh 465.

in accordance with the provisions of section 22, Act XI of 1922. He estimated his income for that financial year at Rs. 16,925-1-0. The Income-tax Officer accepted his estimate as correct, and on the 27th May 1926, made upon it under the provisions of section 23 of the same Act an assessment of Rs. 708-11-0. No objection was taken to this assessment and no objection could obviously be taken to this assessment in view of the fact that it was a correct calculation upon the estimate provided by the assessee himself. He was directed to pay the amount on or before the 27th July 1926. The gentleman died on the 22nd July 1926, and as far as this Court has been able to ascertain, the amount has not yet been paid. It appears that the Income-tax Officer claimed this amount from Jagannath Sarup, Gobind Saran and Baldeo Das, the brothers of the deceased Rai Sarju Prasad Saheb. There was apparently a claim on the 8th March 1927. These brothers filed an application to the Commissioner of Income-tax, dated 18th March 1927, in which they requested that the assessment should be rectified under the provisions of section 25, Act XI of 1922, that an account should be taken as to the actual income of Rai Sarju Prasad Saheb from the 1st April 1926 till the 31st March 1927, and that the amount due should then be paid from the estate.

It should be noted that the estimated income of the Rai Saheb consisted of four parts; Rs. 1,807, interest on securities; Rs. 960, rents of house property; Rs. 185-8-6, interest on loans; Rs. 13,972-8-0, his estimated professional income.

The first three items would stand after his death. Correction would have had to be made in the fourth item. This application of the 18th March 1927 reads to us, not as an objection to the assessment, but as an application for a refund. It was possible for the Income-tax authorities to settle the matter in three ways. They could either insist on the payment of Rs. 708-11-0 as a preliminary, then calculate the actuals of the year and give a refund; or they could make out the account and collect the balance from the brothers; or they could refuse to take any action at all. They adopted the third course, and the ground which they took was that the brothers who had made this application were not the assessees. The word "assessee" is defined in the Act as a person by whom the income-tax is payable. The person by whom the income-tax is payable in this instance was Rai Sarju Prasad Saheb and the income-tax was payable up to the 27th July 1926. He died on the 22nd July 1926, and the income-tax had not been collected on that date. If the view be taken that the only person who can be considered an assessee was Rai Sarju Prasad Saheb, there was clearly no assessee during the last five days allowed for the payment of income-tax and if the assessees were taken to be the persons representing the estate for the purpose of payment of income-tax they must also be considered to be persons representing the estate for the payment of refund.

As far as we can gather it would be difficult from the definition of "assessee" to exclude the representative of the estate responsible for the payment of the income-tax. The Commissioner of Income-tax refused to accept this application on the ground that the applicants were not assessees. We are not, however, concerned to decide that point judicially, and we do not so decide it, as in our opinion this Court has no jurisdiction to determine the matter. There was no appeal under section 31, or section 32 against the assessment, for the obvious reason that Rai Sarju Prasad Saheb accepted the assessment and in those circumstances there was no refusal by the Commissioner of Income-tax under section 66 (2). It is only upon a refusal under section 66 (2) that a High Court has jurisdiction to order the Commissioner to state the case. As far as we gather the question of law as to the meaning of the word "assessee" arose in a proceeding in connection with an assess-

ment other than a proceeding under Chapter 8, in which there had been no order under section 31 or section 32. The Commissioner could, had he wished, have stated a case under the provisions of section 66 (1), but he cannot be compelled to do so. In these circumstances we do not decide the matter and dismiss this application; but, in view of the circumstances, direct that the parties pay their own costs.

[213] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.

[16th September, 1927.]

R. E. Mahomed Kassim Rowther of
R. E. Mahomed Kassim Rowther & Co., Negapatam

Assessee.*

v.

The Commissioner of Income-tax, Madras

Referring Officer.

Income-tax Act (XI of 1922), Sec. 10 (3) (ix)—Agreement to work for share of profits—No right of control or management of business—If constitutes partnership—Share of profits payable to employees—If deductible in the computation of assessable profits of business.

Under an agreement executed in favour of the assessee by 33 persons, the executants agreed to work for a period of 2 years in certain businesses carried on by the assessee. The entire capital of the businesses was contributed by the assessee who by himself and through power of attorney agents retained complete control over them. The assessee had the power to dismiss the executants for contravention of the provisions of the agreement, to take in new co-workers or *kuttalis* and to increase or decrease the shares of the existing ones. On handing over charge at the end of the agreed period, the executants were to have a certain share in the profits of the business, but were not to be liable in case of loss.

On an assessment as sole owner of the various businesses, the assessee contended that the executants of the agreement were his partners in the businesses and that he must be assessed accordingly.

Held, that the executants were merely the employees of the assessee, the agreement not constituting a partnership.

On the claim of the assessee under Sec. 10 (3) (ix) to deduct from the assessable profits of the businesses the shares payable to the executants under the agreement,

Held, that as the sum so payable depended upon the amount of the profits, the said sums could not be said to be expenditure incurred solely for the purpose of earning the profits and as such deductible under Sec. 10 (3) (ix) of the Act.

* Case [Referred Case No. 13 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Income-tax Act of 1922 I have the honour to refer for the decision of the Honourable the Judges of the High Court the following two questions :—

1. Whether in the circumstances of this case there was a genuine and valid partnership?

2. If the answer to the first question is that there is no partnership, was the Income-tax Officer right in refusing to deduct from the assessable in-

come the portion of the profits which was to be paid to the employees as wages?

2. The assessee is a very wealthy Muhammadan who carries on from his headquarters at Klang an extensive business throughout the Federated Malay States. He has branches at Negapatam, Madras and Rangoon in British India. For the year 1924-25 the Income-tax Officer originally made an arbitrary assessment under section 23 (4) on an income of Rs. 5 lakhs because the assessee's local agent failed to appear or produce accounts. On a petition under section 27 the assessment was re-opened and made on an income of Rs. 53,093 :—

Rupees 1,594 from property;
" 5,310 from business at Negapatam;
" 35,230 from business at Madras;
" 8,067 from business at Rangoon; and
" 2,892 from other sources, viz., interest.

The question at issue concerns the method of making the assessment under the heading 'Business'. The Income-tax Officer has treated Mr. R. E. Muhammad Kassim as the sole owner of the business, while the assessee contends that his firm, called R. E. Muhammad Kassim & Co., is a partnership. The only evidence produced to prove the existence of the partnership is a certain document which has been referred to by the Assistant Commissioner and the Income-tax Officer as a partnership deed. I enclose a translation of this document—Exhibit A. I have endeavoured to make the translation literal.

3. In my opinion, the document in question is not a partnership deed but merely an agreement by 33 persons to serve their master R. E. Muhammad Kassim on certain terms. The agreement begins by saying "it is given to R. E. Muhammad Kassim by 33 persons". It goes on to state that R. E. Muhammad Kassim has various businesses at certain places and says that the signatories to the agreement will work for Muhammad Kassim for two years and then take stock and hand over everything to him. It then says that setting aside the book debts which will be taken over by R. E. Muhammad Kassim and having collected the balance and paid the salaries to the clerical establishment and the dues to other persons, the balance '*labhanashtam*' will be divided into 96 $\frac{1}{16}$ shares and distributed in proportions mentioned; R. E. Muhammad Kassim receiving 70 shares and the others receiving small shares varying from $1\frac{1}{2}$ to $\frac{8}{16}$. The profit is to be received by the '*kuttaliq*' in two equal instalments in the 12th and 18th month from the date of the closing of the accounts. It is stated that all the business dealings of the firm are to be signed by Muhammad Kassim and in his absence by his authorized agent and that each of the co-workers or '*kuttalimargal*' is to receive \$30 per month for private expenses. Power is given to Mr. R. E. Muhammad Kassim to take new co-workers or '*kuttalimargal*' or to increase or decrease the share of the existing co-workers at the time of the closing of the accounts. These closed accounts are to be handed over to Mr. R. E. Muhammad Kassim on 31-12-1923 and after that date the whole assets of the business are to belong to him or to his authorized agent, the other '*kuttalimargal*' having no right whatever in the business. At the end of the document, these co-workers bind themselves to obey the orders of Muhammad Kassim or of his authorized agent, and, if they are found to have disobeyed his orders, to have their accounts closed and settled in cash. In the light of this summary of the document it seems to me impossible to contend that it evidences a partnership. The signatories, of whom Mr. Muhammad Kassim does not seem to be one, are

not agreeing to combine their labour to earn profits. They are agreeing to serve Mr. Muhammad Kassim. If it were a partnership and if the co-workers were partners, the chief partner could not, in his individual capacity, authorize another partner to sign on behalf of the firm. The only ground that the petitioner has for holding that the document embodies a partnership is a vague reference in the second paragraph to '*kanapatta labhanashtam*'. This word, it is true, may be translated into profit and loss, but it is very commonly used by merchants to mean simply the balance, and the context shows that there is no question at all of any of the co-workers bearing any loss. The words 'by the Grace of God' would not have been used with reference to losses. When the dues of the firm have been collected and paid, the balance, if any, is to be divided in certain proportions. In the sentence immediately following, which details how the division is to take place, there is no word said about '*nashtam*'. It is the '*labham*' which is divided into 96 1/16 shares.

4. My other reasons for holding that this document does not denote the creation of a partnership are these :

(i) Under section 4 (2) of the Indian Companies Act, (VII of 1913), a partnership of more than 20 persons formed for the purpose of carrying on business is illegal. The Federated Malay States law is similar. Section 4 (ii) of Enactment No. 20 of 1917 of the Federated Malay States runs as follows :—“No company, association or partnerships consisting of more than 20 persons other than an association of miners working in the Chinese '*Hun*' system shall be formed for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association or partnership or by individual members thereof, unless it is registered as a company under this enactment, or is formed in pursuance of some other enactment, or by Royal Charter or Letters Patent”.

(ii) In all his advertisements, circulars, note papers and visiting cards, Mr. R. E. Muhammad Kassim describes himself as the sole proprietor of R. E. Muhammad Kassim & Co.

(iii) In the power-of-attorney which he gave to one of his co-workers, viz., R. A. Abdul Khader Ravuthar to manage the affairs at Madras and Negapatam, he again describes himself as the sole proprietor of the business.

(iv) The manager of the Rangoon branch, K. A. Abdul Hamid, who is one of the signatories to the agreement, in a statement given before the Income-tax Officer, Rangoon, on 4th March 1925 has said : “I have no exact idea as to the constitution of the firm, but I do not think there are any partners. Mr. R. E. Muhammad Kassim is the sole proprietor and he gives bonus to some of his relatives who are associated in the business with him”.

(v) In the objection petition under section 27 drawn up by Vakil Mr. M. Subbaraya Ayyar, it is stated that the petitioner R. A. Abdul Khader is only an agent in charge of the work to be done at Madras and Negapatam.

(vi) The word '*kuttalimargal*' which is used to describe the signatories to the agreement is the common term employed in Tamil districts to denote people who are remunerated by a share in the profits. I have never seen it used to describe a partner.

(vii) The judgment of the Hon'ble Mr. Justice Wallis in C.S. No. 440 of 1912 which petitioner's counsel produced before me in support of his case seems to me to be very much in favour of the Crown. That judgment makes a clear distinction between partners in the real sense of the term and working partners and disposes of the petitioner's claim that according to Muhammadan custom a working partner is always considered by law courts to be a real partner.

5. As regards the second question, the position is as follows :—

According to the agreement described above, the '*Kuttalimargal*' were to be permitted to draw \$ 30 per month and when the accounts had been closed at the end of two years they were to receive additional remuneration in the shape of a further share of the profits in two instalments after a period of 12 and 18 months. Petitioner claims that from the income assessed at Madras, Negapatam and Rangoon as having been earned in the calendar year 1923 that portion which according to the agreement would have to be paid at some later date to the workers should be deducted. The Income-tax Officer made the assessment on the income from these three branches strictly according to the accounts produced. He allowed every item of salary or remuneration deducted in the accounts as having been paid or debited. He felt he could not go beyond the accounts and allow some future problematic deduction. I consider that he was perfectly correct. It has been found that in the year after the year of account some entries were made in the Klang books in favour of the workers. These entries are not strictly in proportion to the shares laid down in the agreement but have been increased or decreased by Mr. Muhammad Kassim at his own will and pleasure. If any of the workers had been away from their posts for a portion of the two years, he has made a proportionate deduction in their shares, while to others he has given bonuses which seem to be in the nature of gifts. I do not know of any justification for the petitioner claiming a problematical future liability as an expenditure. The expenditure, moreover, was incurred in a later year and was not incurred in British India. The whole of the payments made may well have been given out of the profits from the main firm in the Federated Malay States which we are not taxing. Moreover, as the payments were made outside British India, we cannot tax the individuals on the amounts received by them. I am therefore of opinion that the petitioner cannot be allowed this deduction against his income in British India.

EXHIBIT A.

AGREEMENT dated the 11th April 1922, given by the undersigned thirty-three persons to R. E. Muhammad Kassim Avargal of Klang, Selangor District.

I. Your honour has a shop conducted in your honour's name as R. E. Muhammad Kassim and Company, and situated in numbers 25 and 26, Station Street, Klang, Selangor District; and also an attached grocery shop (Bank shawl) in number 34, Rambow Street, and also a business in Dungudiusdin Street, conducted under the name of the Estate Supply Agency, and a grocery shop (Bank shawl) in the town of Kuala Selangor, and four shops in the estate called Jugraland and Carey Limited; and also a business in the shops situated in numbers 17 and 18, Solia Street, Singapore, in the Straits Settlements; and also a business in the shop situated in number 65, Penang Street, Penang. You have also acquired with its full name and with all its rights the business in Klang which was conducted under the name of R. M. Fakir Muhammad Rowther and Company, and you are conducting it in number 94, Rambow Street under the name of R. M. Fakir Muhammad Rowther and Company, and also a grocery shop (Bank shawl) in Pandamaran Road in Port Swettenham. We shall conduct these businesses as a new agency from 1st January 1922 last till 31st December 1923, for a period of two years, and after that period and having settled the accounts, and valued the goods according to the then prevailing market rate, we shall hand over all the abovesaid business either to your honour or to those holding your honour's power of attorney.

II. We agree to collect the balance of book-debts, apart from those which you take over and after having paid the dues to other persons and salaries of employees, the balance found (*kanappatta labhanashtam*), if by the grace of God there is any, is to be divided according to the respective shares as detailed below, for capital invested and for labour contributed. There shall be in all 96 $\frac{1}{16}$ shares. We shall receive the above profit in two equal instalments in the 12th month and 18th month from the date when the shop's accounts were settled either from your honour or from those holding your honour's power of attorney.

III. DETAILS OF SHARES.

	SHARES.
(1) R. E. Muhammad Kassim Avargal—Capital \$ 5,00,000	70
(2) K. A. Abdul Gafoor—for labour contributed	1 $\frac{1}{2}$
(3) R. A. Abdul Khadar do.	1 $\frac{1}{2}$
* * * * *	
Total shares for 35 items	96 $\frac{1}{16}$

IV. For all the necessary lendings and borrowings of the company your honour will sign. In your honour's absence persons holding your honour's power of attorney will sign.

V. Persons holding your honour's power of attorney shall sign for and on behalf of the company only for the money lending (*lavadevi*) connected with the business of the company and not for their private expenses or as sureties for other persons.

VI. The abovesaid *Kuttalimargal* shall receive for their private expenses either from your honour or those holding your honour's power of attorney (pay) at the rate of \$30 (dollars thirty) per month for each labour share.

VII. At the time of the closing of the company's accounts, if it is desired to bring in a new *Kuttali* or to give additional shares to Kuttalis, your honour may do according to your wishes.

VIII. On 31st December 1923, the end of the period of two years, after the shops accounts are settled and the shops handed over either to your honour or those holding your honour's power of attorney, there will be no connexion between us and the above company.

IX. We the undersigned shall be bound by the conditions contained in the above eight paragraphs and shall act in accordance with the law and rules unanimously, and without treachery towards one another and be dutifully bound by your honour's orders and the orders of those holding your honour's power of attorney. The drawings in the ledgers of persons who do not obey and who contravene the above conditions and who leave their employment in the middle without reason and who act against law and rules shall be settled in cash and such persons shall be subject to your honour's orders. Agreeing to this we have affixed our signatures hereto. We agree to the settling of the shops' accounts at your honour's pleasure either before or after the period specified in paragraph I for settling the shops' accounts.

[Signatures].

T. R. Venkatarama Sastri (Advocate-General) and E. Vinayaka Row,
for the assessee.

M. Patanjali Sastri, for the Crown

JUDGMENT.

THE OFFG. CHIEF JUSTICE.—The first question referred is “whether there was a genuine and valid partnership?” This depends upon the construction of the agreement dated the 11th of April 1922 executed by 33 persons in favour of the petitioner. The petitioner has been treated as the sole proprietor of his firm and been assessed accordingly, and he contends that these 33 persons who have executed the agreement of April 1922 (Exhibit A) are his partners in the business. The Commissioner has found that this agreement does not constitute a partnership agreement and we entirely agree. Apparently there is provision that each of the executants is to have a certain share in the profits of the business when ascertained at the end of the two years during which it is to be in force. No provision is made for their liability in case of loss and the complete control of the business is retained by Muhammad Kassim, who contributed the whole capital. Not only is he to have the control of the business but even persons holding power of attorney from him are to have the same power. The executants agree to be bound by Muhammad Kassim’s orders and the orders of those holding his power of attorney and also agree that, if they contravene the provisions of the agreement, they can be dismissed. The proprietor has also the power of altering the shares. On these facts, it is clear that this is not a partnership agreement and that these 33 persons were merely the employees of Muhammad Kassim and were entitled to certain shares in the profits when ascertained at the end of the two years.

The second question runs as follows : “ If the answer to the first question is that there is no partnership, was the Income-tax Officer right in refusing to deduct from the assessable income the portion of the profits which was paid to the employees as wages?” The petitioner claims to deduct the shares payable to the employees under section 10 (2) (ix) of the Indian Income-tax Act which runs; “any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains.” The Income-tax Commissioner has held that it has not been shown that the shares were paid out of the capital in the Madras branches of the petitioner’s firm and that there are merely some entries in the accounts of the head office at Klang in the Federated Malay States. Apart from this, we think it is clear that this expenditure does not come within the meaning of section 10 (2) (ix). Such expenditure is to be set off against the profits earned in the year and it must be incurred “solely for the purpose of earning such profits or gains.” Is it possible to say that payments out of profits really constitute expenditure incurred solely for the purpose of earning such profits? The amount of the expenditure depends on the amount of the profits, and, consequently, it is impossible to hold that it was expenditure incurred solely for the purpose of earning those profits.

It is contended by the learned Advocate-General that expenditure must be deemed also to include liability and, inasmuch as these payments were in the nature of wages of which payment was deferred, they, equally with wages, should be deducted and, to hold otherwise, would produce the anomaly that part of the wages of the firm might be deducted and another part not. This may be anomalous, but it must be remembered that income-tax is calculated on profits and when the tax has been calculated the expenditure on the deferred wages has not been incurred. In fact, it might not ever be incurred if the proprietor chose to break the agreement, and certainly it cannot be deemed to be expenditure incurred for the purpose of earning such profits. It is not the expenditure that has led to the profits being earned, but it is a

promise that such expenditure would be made in the future that has possibly produced those profits. Rule 3 (L) of Schedule D of the English Income-tax Act, 1918, prescribes that "in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of any annual interest, or any annuity, or other annual payment payable out of the profits or gains." This is very specific and would include the payment out of profit in the present instance. Similarly, if some of the working partners are to get a share in respect of capital put in by them, any payment to them as interest on that capital cannot be deducted under section 10 (iii) of the Indian Income-tax Act. In view of the language of the section which is very clear, we think it is unnecessary to refer to the cases cited before us and hold that, although it may possibly work hardship in a few cases, the payments to these working partners out of the profits cannot be deducted under section 10 (2) (ix). Petitioner will pay costs including Counsel's fee of Rs. 250.

[214] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir William Phillips, Kt., Officiating Chief Justice, Mr. Justice Ramesam and Mr. Justice Beasley.

[16th September, 1927.]

R. E. Mahomed Kassim Rowther of R. E.

Mahommed Kassim Rowther & Co., Negapatam .. Assessee.*

v.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 4 (3) (i)—Foreign remittances—Part of remittances transferred to charity account and spent thereon in British India—No proof of creation of a trust before remittance—Claim for exemption from assessment as trust funds.

The assessee carrying on business in Klang, Federated Malay States, remitted large sums of money to British India, the said remittances being first credited in the Klang ledger kept at Rajagiri, the assessee's chief place of residence in British India. From this ledger, part of the remittances were transferred to two charity accounts and were spent on charitable purposes. On a claim for exemption as trust funds under sec. 4 (3) (i) of the Income-tax Act.

Held, that in the absence of proof that the said amounts were impressed with a trust in Klang before remittance into British India, the remittances must be deemed to be out of the assessee's own moneys and hence were not exempt from assessment.

Case [Referred Case No. 14 of 1926] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

Under section 66 (2) of the Income-tax Act, 1922, I have the honour to refer for the decision of the Hon'ble the Judges of the High Court the following questions which have arisen in connection with the assessment of Mr. R. E. Muhammad Kassim of Negapatam for the year 1925-26 :—

(1) Whether in the circumstances of the case there was no genuine and valid partnership?

(2) If it is held that there is no genuine and valid partnership, whether it is legal in the circumstances of this case to refuse to allow the share of the working partners as a deduction?

* (1928) 54 M.L.J. 226; 27 L.W. 817; A.I.R. (1928) Mad. 371 (1).

(3) Whether the sums shown in the accounts of the business in the names of certain charitable and religious institutions and remitted to British India and spent on these institutions are assessable under the Indian Income-tax Act, 1922?

2. The facts of the case are similar to those detailed in the reference already made relating to the 1924-25 assessment except that a new agreement regarding the constitution of the firm was drawn up on 26th March, 1925. A literal translation of the new agreement is appended—Exhibit A.* It is similar to the former agreement except that three of the '*kuttaligals*' are said to have contributed \$5,000 as capital. There is no proof that this capital was actually contributed and the only evidence on the point is the statement of one of the *kuttaligals* given before me at the hearing of the application that his \$5,000 was moneys standing to his credit in the Klang accounts. I do not consider that the entry showing contributions of capital by 3 *kuttaligals* makes any difference in the construction of the document. These 3 *Kuttaligals* are in exactly the same position as the '*Madibhagidars*' referred to in *Commissioner of Income-tax, Bombay v. Haji Jamal Nurmahomed & Co.* (1) They have lent money to the petitioner on which, in accordance with Muhammadan custom they are to receive a share of profits in lieu of interest.

3. For the reasons given in the previous reference I am of opinion that the agreement dated 26th March, 1925 does not create a partnership.

4. As regards the second point referred, this case is slightly different to that of the previous year because in the present accounting period entries were made in the Klang accounts showing a distribution of the profits between the *kuttaligals*. These entries however relate to the previous agency. There is no real proof that these payments were made in February 1924, the only proof offered before me being an entry in one of the Klang books, that entry being followed by some undated signatures which cannot possibly have been made at the same time. In spite of the entry I do not think any reduction can be made in the assessment. The entry occurs in the books of the firm at Klang. We are only assessing the profits of the Madras, Negapatam and Rangoon branches. As the books of these branches contain no entries regarding these payments and as the payments were recorded in the books relating to the businesses in the Straits which we are not assessing, the payments are not an admissible deduction against the British Indian profits. Further the payments made are not in proportion to the shares shown in the old agreement which should have governed them. They have been reduced or increased at the will of Mr. R. E. Muhammad Kassim. There was no provision in the old agreement for the reduction of shares for absence and the reductions appear to have been entirely arbitrary. The recipients are mostly relatives and the payments appear therefore to be of the nature of gifts.

5. As regards the third point—the facts are that large remittances are received from Klang through the Chartered Bank. They are first credited in the Klang ledger kept at Rajagiri—the petitioner's chief place of residence in British India. From that ledger part of the remittances are transferred to the two charity accounts—*Jackathu* and *Madrasa*. The Income-tax Officer held that the amounts transferred to the two charity accounts, viz., Rs. 27,926, were private expenditure by the assessee and therefore profits of the Klang business remitted. Petitioner argues that they are trust moneys. The only portions which could possibly be construed as trust moneys are the $\frac{1}{2}$ shares due to "*Dharma*" and "*Madrasa*"—according to the old agreement, viz.,

* Not printed.

(1) 1 I.T.C. 396.

\$1,309.84 each. The balance is obviously private money. As regards the two sums of \$1,309.84 I do not consider that they can be regarded as trust funds. Mr. R. E. Muhammad Kassim has simply shown some of his own profits in the names of two charities. The Madras High Court has already held in the case of *A. V. R. A. Adaikappa Chetti* that such profits if remitted to British India are taxable.

T. R. Venkaturama Sastri (Advocate-General) and *E. Vinayaka Row*, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

THE OFFG. CHIEF JUSTICE.—In this case three questions have been referred, of which the first two are the same as in Referred Case No. 13 of 1926† and must receive the same answers.

The third question is, “whether the sums shown in the accounts of the business in the names of certain charitable and religious institutions and remitted to British India and spent on these institutions are assessable under the Indian Income-tax Act, 1922?” Exemption is claimed by the petitioner on certain sums which were remitted from Klang to British India and have been spent on charitable and religious institutions in British India. It is suggested that these sums were taken from a fund set apart in Klang for these charitable and religious purposes. This does not seem to have been proved and, therefore, the remittance to British India must be deemed to be remittances out of the proprietor’s own money which he could dispose of as he pleased. That he, in fact, spent the moneys on charitable and religious institutions would not exempt those moneys from income-tax. In order to secure exemption on that ground, it must be shown that the moneys were impressed with a trust before they left Klang for British India. It is not sufficient to allot them to a trust after their receipt in British India.

The answer to this question must be in the affirmative.

Petitioner will pay costs including Counsel’s fee Rs. 250.

RAMESAM, J. :—I agree.

BEASLEY, J. :—I agree.

[215] PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.

PRESENT : *The Lord Chancellor, Lord Buckmaster, Lord Carson, Lord Darling and Lord Warrington of Clyffe.*

[4th November, 1927.]

The Commissioner of Income-tax, Bombay

.. Appellant.*

v.

The Western India Turf Club, Limited

.. Respondents.

Income-tax Act (XI of 1922), Secs. 26 and 55—Finance Act, 1925, Schedule III, Part II—Super-tax—Western India Turf Club—Conversion into limited company—Assessment on income of previous year before conversion—Rate of super-tax applicable—Scale rate or company rate.

* (1928) 55 I.A. 14; 54 M.L.J. 1; 52 Bom. 123; 32 C.W.N. 457; 26 A.L.J. 474; A.I.R. (1928) P.C. 1.

† Reported at p. 482, ante.

The Western India Turf Club, Ltd., originally an unincorporated association, was converted into a limited company under the Indian Companies Act on the 1st April, 1925. On an assessment to super-tax for the year 1925-26 on the income of the Club in the previous year at the scale rates prescribed under Schedule III, Part II (b) of the Finance Act, 1925, the company contended that the assessment must be at the flat rate of one anna applicable to a company under Sec. III, Part II (i) of the Finance Act. On a reference by the Commissioner of Income-tax under Sec. 66 (2) of the Income-tax Act, the High Court upheld the contention of the assessee.

On appeal to the Privy Council.

Held, confirming the judgment of the High Court, that the assessment must be at the flat rate applicable to a company on the previous year's income of the Club—the predecessor-in-title of the company.

Begg Sutherland & Co., Ltd. v. Commissioner of Income-tax, 2 I.T.C. 30, Doubtful.

Appeal No. 57 of 1927 from a judgment of the High Court of Judicature at Bombay (MacLeod, C. J. and Crump, J.), dated the 9th April, 1926, on a Reference made by the Commissioner of Income-tax, Bombay.

CASE ON BEHALF OF THE APPELLANT.

1. This is an appeal from a judgment of the High Court of Judicature at Bombay, (MacLeod, C. J. and Crump, J.)^{*} delivered upon a reference made by the Commissioner of Income-tax, Bombay, under the Indian Income-tax Act 1922, whereby the opinion of the Commissioner upon the questions raised by the case was overruled, and it was decided that the amount of an assessment to super-tax made upon the respondent company was excessive.

2. The question arising in this appeal, shortly stated, is whether the rate of super-tax applicable to the income dealt with by the assessment was in the circumstances of the case the rate applicable to the income of an unincorporated association of individuals, or the rate applicable to that of an incorporated company.

3. The respondent company is a company incorporated under the Indian Companies Act, No. VII of 1913, as a company limited by guarantee. The company was registered on the 1st April, 1925 with the object of taking over, and did in fact take over, the assets, effects and liabilities of the Western India Turf Club.

The Western India Turf Club before the 1st April, 1925 was a members' club and unincorporated, and had been assessed to super-tax upon its total income as an unregistered firm or association of individuals not being a firm at the rates of duty prescribed for such a firm or association by the enactment for the time being in force.

For the year of charge beginning the 1st April, 1925 the rate of duty prescribed for such a firm or association was a scale rate rising from one to six annas in the rupee as provided by the Indian Finance Act, XIII of 1925, i.e., for the excess over the first fifty thousand one anna in the rupee, for the next fifty thousand one and a half annas, for the next fifty thousand two annas and so on up to six annas.

By the said Act the rate of duty prescribed for an incorporated company for the same year of charge was a flat rate of one anna in the rupee.

4. The company after its incorporation on the 1st April, 1925, made for purpose of super-tax for the year 1925-26 a return of the total income of the unincorporated club of the previous year 1924-25. Section 55 of the Indian Income-tax Act, 1922, prescribes that super-tax shall be charged, levied and paid

“ in respect of the total income of the previous year ” of (*inter alia*) any company, unregistered firm or other association of individuals.

The Senior Income-tax Officer assessed the amount of the income of the previous year of the unincorporated club at Rs. 15,03,522 and no dispute arises in the case about the correctness of this figure.

5. Section 58 of the Indian Income-tax Act, 1922, made applicable to super-tax section 26 of the same Act, which is as follows :—

“ 26. Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment.”

6. The Senior Income-tax Officer considered that the rate of super-tax applicable to the income in respect of which the assessment was to be made, namely, the income of the unincorporated Club for the previous year, was the scale rate prescribed as above stated for the income of an unregistered firm or unincorporated association of individuals, and on this basis he determined, in pursuance of section 23 of the said Act, the amount of super-tax to be Rs. 4,59,153.

7. The respondent company, upon being served with a notice of demand of that amount of super-tax, objected to the amount of the tax so assessed and appealed to the Assistant Commissioner under section 30 of the said Act on the ground that the rate of tax applicable was not the scale rate which had been adopted, but the flat rate of one anna in the rupee applicable to the income of an incorporated company. Upon the basis of this contention the super-tax payable would have been Rs. 90,845-2-0.

The Assistant Commissioner dismissed the appeal and confirmed the assessment under section 31 of the said Act on the basis determined by the Senior Income-tax Officer.

The respondent company thereupon, pursuant to section 66 (2) of the said Act, required the Commissioner of Income-tax to refer to the High Court the questions of law arising out of the assessment, and the Commissioner accordingly drew up a statement of the case and submitted it with his own opinion thereon as required by the section to the High Court. The said statement is printed in the record of proceedings.

8. The questions for the opinion of the High Court are set out in para. 3 of the statement as follows :—

“ The questions of law on which the opinion of your Lordships is required under section 66 (2) are as under :—

(i) When an unregistered firm converts itself into a limited company, while assessing the latter under section 26 read with section 58 on the income earned by the unregistered firm prior to the conversion, is super-tax to be levied at the scale rates of one to six annas applicable to the income of unregistered firms or at the flat rate of one anna applicable to the income of a company.

(ii) Is section 26 of the Act to be regarded as requiring that the income earned by the unregistered firm be treated as the income of a company and taxed at the flat rate of one anna, or the section to be taken as merely requiring the company to step into the shoes of the defunct firm for the sole purpose of payment of the super-tax due from it as an unregistered firm?

(iii) Whether the assessment to super-tax levied on the club for the year 1925-26 at scale rates between one anna and six annas is in order; and

(iv) Whether the club as a limited company should not be assessed to super-tax for the above year at the flat rate of one anna in the rupee.

9. The concluding paragraph of the statement summarises the opinion of the Commissioner upon the questions referred to the Court as follows :—

“ For the above reasons, I am clearly of opinion that the profits made by the club in the year 1924-25 when it was not a limited company have been rightly charged to super-tax at the scale rates of one to six annas and that the flat rate of one anna cannot be applied to these profits which are not those of a company having been made prior to the conversion of the Club into a limited concern. My answer to the questions framed in para. 3 above is therefore as under :—

(i) The profits are liable to super-tax at the scale rates of one to six annas and not at the flat rate of one anna.

(ii) Section 26 is to be regarded as merely requiring the company to take the place of the defunct firm for the purpose of the payment of the tax due from it on its profits earned prior to the conversion.

(iii) The Club is rightly assessed to super-tax at the scale rates of one to six annas.

(iv) It cannot be assessed for the year in question at the flat rate prescribed for a company.

10. The reference made by the Commissioner of Income-tax came on for hearing in the High Court on the 9th April, 1926 before Sir Norman Macleod (C. J.) and the Honourable Mr. Justice Crump, and judgment was given on the same day overruling the opinion of the Commissioner of Income-tax and deciding in favour of the respondent company the questions submitted in the case. The Court held that the rate of super-tax applicable was the flat rate of one anna in the rupee and awarded costs against the Commissioner.

Against this judgment and order the Commissioner of Income-tax has upon the certificate of the High Court preferred this appeal to His Majesty in Council.

11. The appellant humbly submits that the judgment of the High Court is wrong and should be reversed and that this appeal should be allowed for the following amongst other

Reasons.

(1) Because the assessment made by the Income-tax Officer for the year beginning 1st April, 1925 was correct.

(2) Because under section 55 of the Indian Income-tax Act, 1922, the super-tax for that year is to be charged in respect of the income of the unincorporated club of the previous year and the rate of tax applicable is the rate applicable to that income and not the rate applicable to the income of an incorporated company.

(3) Because section 26 of the said Act, as applied to super-tax by section 58 thereof, requires that the amount of super-tax so chargeable in respect of the income of the club of the previous year shall be charged and levied by means of an assessment made upon the respondent company which succeeded to the business of the unincorporated club.

(4) Because nothing in section 26 of the said Act affects the rate of super-tax applicable to the income in question, and the fact that the person

from whom the super-tax so charged is to be recovered thereunder by assessment is a company is irrelevant.

(5) Because the subject-matter of charge is the income of the club of the previous year and not the income of the respondent company and the rate of tax applicable to the latter income is not applicable to the former.

(6) Because the opinion of the Commissioner of Income-tax on the questions in the case is right and should be confirmed and the reasoning of the judgment of the High Court is not well founded.

Sir G. R. Lowndes, K.C. and Reginald Hills, for the appellant.

A. M. Latter, K.C. and Raymond Needham, for the respondents.

JUDGMENT.

THE LORD CHANCELLOR :—The question raised by this appeal is a short one. The Western India Turff Club was originally an unregistered association; but as from the 1st April, 1925, it was converted into a company by being registered under the Indian Companies Act (Act No. VII of 1913) as a company limited by guarantee, the object of the company being to take over the assets, effects and liabilities of the Western India Turf Club. The question raised in these proceedings is, at what rate that company should pay super-tax for the tax year commencing on the 1st April, 1925.

The enactment chiefly in point is section 55 of the Indian Income-tax Act (Act No. XI of 1922). That section is in these terms :—

‘ In addition to the income-tax charged for any year, there shall be charged, levied and paid for that year in respect of the total income of the previous year of any individual, unregistered firm, Hindu undivided family or company, an additional duty of income-tax (in this Act referred to as super-tax) at the rate or rates laid down for that year by ~~Act~~ of the Indian Legislature.’

On that section two questions may arise, which it is necessary to keep distinct.

First, the question may arise on what amount of income the tax-payer is to pay his super-tax. On that point the section provides that he is to pay super-tax in respect of the total income of the previous year. Strictly speaking, this company had no total income in the previous year, for it did not then exist, but that difficulty is removed by section 26 of the same Act, which provides that ‘ Where any change occurs in the constitution of a firm or where any person has succeeded to any business, profession or vocation, the assessment shall be made on the firm as constituted, or on the person engaged in the business, profession or vocation, as the case may be, at the time of the making of the assessment.’ It should be added that section 26 is applied to super-tax by section 58. The effect of those sections is that, for the purpose of assessment to super-tax, you must take the total income, not of the respondent company itself, but of the predecessor in title of the company; and the income in this case has been assessed on that basis.

The second question which arises is, at what rate is the tax-payer to pay super-tax. With regard to that point, section 55 provides that the tax-payer is to pay ‘ at the rate or rates laid down for that year ’—that is, for the year of assessment—‘ by Act of the Indian Legislature.’ In other words, for the purpose of ascertaining the rate of the tax you are referred to a statute to be afterwards passed. That statute was afterwards passed, and it is Act XIII of 1925. It provides by section 7, sub-section (2) that

‘ The rates of super-tax for the year beginning on the 1st day of April, 1925, shall for the purposes of section 55 of the Indian Income-tax

Act, 1922, be those specified in Part II of the Third Schedule." When one turns to Part II of the Third Schedule, one finds these rates specified, namely, "In respect of the excess over 50,000 rupees of the total income (1) in the case of every company, one anna in the rupee." Then follow other rates relating to corporations, individuals or associations, not being companies, and some of those rates are calculated on a rising scale. What is the effect of that? It can only be that this particular tax-payer, being a company falling within the first words of Part II of Schedule III, must pay at the rate there specified, namely, at the flat rate of one anna in the rupee.

The argument which has been used in favour of the appeal seems to involve the fallacy that liability to tax attached to the income in the previous year. That is not so. No liability to tax attached to the income of this company until the passing of the Act of 1925, and it was then to be taxed at the rate appropriate to a company.

With regard to the Allahabad case which has been cited *Begg, Sutherland and Co., Ltd. v. Commissioner of Income-tax, United Provinces* (1) it is sufficient to say that, if the question there decided should again arise, that decision will require further consideration.

For the reasons which they have given their Lordships are of opinion that this appeal fails, and they will humbly advise His Majesty that it be dismissed with costs.

Solicitor for appellant : *Solicitor, India Office.*

Solicitor for respondents : *E. F. Turner & Sons.*

[216] IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

Before Mr. Justice Sulaiman, Mr. Justice Banerji and Mr. Justice Ashworth.

[2nd December, 1927.]

Mukund Sarup

v.

.. Assessee.*

The Commissioner of Income-tax, United Provinces

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 2 (1) and 4 (3) (viii) and 10—Money-lending business—Grant of loans on usufructuary mortgage with simultaneous lease back—Income therefrom; if agricultural income—Exemption of such income from assessment of profits of the business.

Where a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes an usufructuary mortgage and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments which amount to a definite percentage on the sum advanced, the said annual payments are "agricultural income" as defined in Sec. 2 (1) of the Income-tax Act and hence should be excluded from the assessment of the profits and gains of his business.

Subramanya Sastri v. Commissioner of Income-tax, Madras, 2 I.T.C. 152, distinguished and dissented from.

Case [Miscellaneous Case No. 605 of 1927] stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, United Provinces, for the opinion of the High Court.

CASE.

M. Mukund Sarup was assessed to income-tax on 22nd October, 1925 for the year 1925-26, and on 27th October, 1926 for the year 1926-27. The income assessed was derived from property and money-lending.

* (1928) 26 A.L.J. 280; A.I.R. (1928) All. 81; 107 Ind. Cas. 583.
(1) 2 I.T.C. 30.

2. It came to light subsequently that the assessee had also received large sums of interest from usufructuary mortgages and a notice was issued to the assessee under section 34 of the Income-tax Act, calling on him to make a fresh return of his income for both years. The assessee complied with the notice and submitted returns of income showing separately the interest received from simple and usufructuary mortgages. He further claimed that the interest from the latter was not assessable on the ground that he was responsible for the land revenue on the mortgaged property. The Income-tax Officer was of opinion that the income was derived from money-lending and not from landed property and assessed it to income-tax.

3. The assessee appealed to the Assistant Commissioner who, following the decision of the Madras High Court in the similar case of *Subramanya Sastrigal v. The Commissioner of Income-tax, Madras* (1) rejected the appeal.

4. The assessee now demands a reference to the High Court on the ground that the income from the usufructuary mortgages is income "derived from land which is used for agricultural purposes and is assessed to land revenue" and is therefore not liable to assessment.

5. An extract copy of the relevant part of one of the mortgaged deeds and of one of the leases in question is attached. The deeds are of the same date and the interest payable is a definite sum in addition to the land revenue and cesses.

6. The point of law which arises and which is referred for the decision of the High Court is :—

If a person carrying on money-lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage ($8\frac{1}{4}$ in the case cited above) on the sum advanced, should those annual payments be excluded from the assessment of the profits and gains of his business as being agricultural income within the meaning of section 2 (1) (a) of the Indian Income-tax Act, 1922 ?

7. The Commissioner of Income-tax, following the decision of the Madras High Court cited, is of opinion that such sums should not be excluded.

MORTGAGE-DEED, DATED 18TH JULY, 1921.

I, Chaudhri Debi Sahai living in Bajhauri
 for the purpose of clearing a debt do mortgage with
 possession all my property described below to M. Mukund
 Sarup of Sikandrabad for the sum of Rs. 22,500 and make
 over possession to him. He is now in possession. He can cultivate the land
 himself or can let it out to tenants or lessees on rent. The profits from the
 property are to be equivalent to the interest on the loan during the period of
 the mortgage. At the end of each *Fasli* year the mortgagor may pay back
 the whole, or one-half, or one-third, or one-fourth of the mortgage money, but
 never less than one-fourth Mutation will be effected in the
 name of the mortgagee. If mutation be not effected or possession be not given .
 (other conditions) the mortgagee shall be
 entitled to realize in any way he deems fit the money lent by him together
 with interest at the rate of one per cent. per mensem from the date of the
 mortgage or can sue for possession It has further

been agreed that the mortgagor shall receive a lease of the mortgaged property for the period of the mortgage and a lease will be drawn up and registered simultaneously with the mortgage-deed. . . . If at the time of redemption of the mortgage any rent or lease money due to the mortgagee shall be outstanding the mortgagor will pay this along with the mortgage money. If any sum whatsoever is outstanding the mortgagor shall not be entitled to redeem the mortgage.

DEED OF LEASE, DATED JULY 18, 1921.

I, Chaudhri Debi Sahai . . . have this day mortgaged with possession the property specified below to M. Mukund Sarup . . . and have taken a lease of the aforesaid property for the sum of Rs. 2,582-4-0 per annum . . . I hereby undertake to pay out of the lease money the sum of Rs. 726 per annum on account of land revenue and cesses . . . and to make over the balance of Rs. 1,856-4-0 to the mortgagee half on December 15 and half on June 15 in each year . . . If any portion of the lease money falls into arrear I will pay interest at the rate of 1 per cent. per mensem. . . . If through default on my part the mortgagee has to pay the land revenue and cesses I will pay interest at the aforesaid rate to the mortgagee. . . . If any conditions in this lease are broken the mortgagee will be entitled to eject me and to cancel the lease. . . . At the time of redemption of the mortgage this lease will be cancelled.

Sir Tej Bahadur Sapru, Narain Prasad Asthana and Shiva Prasad Sinha, for the assessee.

Uma Shankar Bajpai, for the Crown.

JUDGMENT.

SULAIMAN, J.—This is a reference under section 66 of the Indian Income-tax Act of 1922. It appears that Munshi Mukund Sarup in submitting his income-tax returns for the years 1925-26 and 1926-27 did not include the income derived by him from certain usufructuary mortgages in his favour. The Income-tax Officer on this discovery came to the conclusion that such income was derived from money-lending business and was not derived from landed property and was therefore liable to income-tax. The assessee appealed to the Assistant Commissioner who relying upon a Full Bench decision of the Madras High Court in the case of *Subramanya Sastrigal v. The Commissioner of Income-tax, Madras* (1) dismissed the appeal. The assessee then requested the Commissioner to refer the question of law which arose in this case to the High Court. The Commissioner has formulated the question for consideration in the following words :

If a person carrying on money lending business lends money in the course of such business on the security of lands of which he takes a usufructuary mortgage and if he immediately leases those lands back to the mortgagor with a stipulation for fixed annual payments, which amount to a definite percentage ($8\frac{1}{2}$ in the case cited above) on the sum advanced, should those annual payments be excluded from the assessment of the profits and gains of his business as being agricultural income within the meaning of section 2 (1) (a) of the Indian Income-tax Act, 1922?

The main question underlying this reference appears to be whether if the case is not that of a pure usufructuary mortgage but one where there

is a simultaneous grant of a lease of the mortgaged property to the mortgagor so that the net result is that the mortgagee obtains regular cash payments representing interest on his capital, the latter is exempted from liability to pay income-tax.

Section 3 of the Act, in the first place, makes all income, profits and gains liable to income-tax, but section 4 contains an exemption clause which among other matters provides that the Act shall not apply to "agricultural income." Now agricultural income is defined in section 2, sub-clause (1) as being any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Government as such. And under clause (b) agricultural income is also income which is derived from such lands by agriculture. These two clauses undoubtedly indicate that the agricultural income can either be derived by a person who is actually carrying on agriculture or cultivation, or it may represent the rent received by him from land which is used for agricultural purposes though the person who receives the rent may not himself be cultivating that land.

It seems necessary to clear the ground by first considering the question whether a pure usufructuary mortgagee is liable to pay income-tax. The learned Advocate for the Crown has laid great stress on the assumption in the reference that the present assessee is carrying on money-lending business and that it was in the course of such business that he has invested his capital, the return of which is his income from these lands. It is therefore his contention that his gains are gains of business and not rent. It may be conceded that the profits made by a usufructuary mortgagee even though arising out of the land mortgaged to him, are gains of his business, if he has taken this mortgage in the course of his business as an investment. But this concession does not necessarily involve an admission that such gains of business are not rent within the meaning of section 2 so as to exempt him from liability to pay income-tax. The money which actually comes into the hands of a pure usufructuary mortgagee may be rent received direct from tenants or may be the profits from actual cultivation. It is therefore either rent derived from land which is used for agricultural purposes, or is income derived from land by agriculture. In either case it is agricultural income. It may also happen to be gains of his business, but that does not necessarily take him out of the exemption clause. I am therefore clearly of opinion that in the case of a pure usufructuary mortgagee there is no liability to pay income-tax. The position of such a mortgagee is very much analogous to that of a proprietor who is entitled to have his name recorded in the revenue papers and is for the purposes of revenue courts treated as a co-sharer. He is also entitled to sue for arrears of rent, eject tenants and to enter into possession and cultivate the land himself as the proprietor himself could have done. He is further liable to pay Government revenue which a simple mortgagee is not. His position is analogous to that of a lessee who takes a lease of agricultural lands, say for a fixed period, on payment of some *nazrana*. The latter class of transferees cannot be liable to the payment of income-tax. It is thus clear that the income received by a usufructuary mortgagee is really agricultural income, though it just happens to be also a return for the capital invested by him. To hold that he is liable to pay both Government revenue and income-tax would be imposing a double taxation which is against the policy of the Act.

Coming to the next question whether even if a usufructuary mortgagee is not liable to pay income-tax, a mortgagee who at the same time leases back the mortgaged land to the mortgagor with a stipulation that there would be

a fixed annual payment calculated on the basis of rate of interest agreed upon between the parties is in a worse position, it seems to me that to hold that such a person is liable to pay income-tax would amount to holding that the transaction is not that of a usufructuary mortgage but almost a simple mortgage. It is impossible to hold in this case that the transaction was not that of a usufructuary mortgage. No doubt the mortgage-deed and the lease were executed at one and the same date and the cross references in the two documents indicate that the whole transaction was settled at one time. Nevertheless there are certain distinguishing features which make the position of the present usufructuary mortgagee quite distinct from what it would have been if he had taken a purely simple mortgage. He has under the lease the right to recover rent through the revenue court which very often is a speedy remedy. He has also the security of the fixed amounts being paid to him regularly year after year with the option of entering into possession on the default of such payment. If he enters into possession after the ejection of the mortgagor he is entitled to cultivate lands himself or to let the lands to tenants and receive profits from them. Under these circumstances it seems impossible to hold that the position of the assessee is that of a purely simple mortgagee who is liable to pay income-tax.

With regard to the Full Bench case of the Madras High Court relied upon by the Assistant Commissioner, I need only say that the judgment is very brief and contains no reasons in support of the view urged on behalf of the Crown. The learned Judges appeared to have assumed that the finding of fact arrived at by the Commissioner who had made the reference necessarily involved the result of the reference being answered in the negative. Perhaps they meant to assume that the finding of the Commissioner that in that case the transaction was merely a device to evade the payment of the income-tax and was not in reality a transaction of the usufructuary mortgage and the income was not derived from the land but from a business of the vendee was a finding of fact which could not be disturbed. I am not saying that the remarks of the Income-tax Officer did in reality amount to a finding of fact. But the learned Judges appear to have treated it as such, and on that assumption held that the answer must be in the negative.

I am, therefore, of opinion that the answer to the question should be in the affirmative, and the annual payments should be excluded from assessment.

BANERJI, J.—I agree. I am of opinion that upon the facts of the present case the income which is derived by the assessee is income which comes within the definition of agricultural income in section 2 (1) of the Income-tax Act. The mere fact that the usufructuary mortgagee has granted a lease to the mortgagor, in my opinion does not alter what in law is the effect of the document executed by the mortgagor in favour of the mortgagee. It still remains a usufructuary mortgage and in the case of a usufructuary mortgage, although it would come within the definition of business, it is exempted from the operation of the Act by reason of the definition of agricultural income in section 2 which says that any income derived from any rent from land which is used for agricultural purposes is exempted from taxation. In my opinion in no case can the profits which the usufructuary mortgagee receives, be called anything but rent derived from land used for agricultural purposes.

ASHWORTH, J :—I concur. The owner of agricultural land who leases land is admittedly not liable to income-tax on the rent received. A usufructuary mortgagee is, for the time being, the owner of agricultural land, and, so long as the mortgage subsists, he is in the same position as an owner.

The Government Advocate attempted to distinguish the rent paid to an absolute owner from that paid to a usufructuary mortgagee by drawing a very subtle distinction. His argument was that a person purchasing agricultural land must pay the full market price, while a person taking a usufructuary mortgage of that land will never advance the whole market price. Consequently by reason of the mortgage, he obtains higher profits on the money invested than a purchaser would, and the difference should be regarded as a profit from the business of money lending. But the price paid for the acquisition of land cannot affect the character of the land acquired. A usufructuary mortgagee is, like the owner of agricultural land, free from payment of income-tax, because the land is liable to land revenue. My researches into the history of land revenue have inclined me to believe that it is in reality a rent claimed by Government but collected under the procedure applicable to a tax. The exception in section 2 of the Income-tax Act, however, proceeds on a different assumption. It is clear that the exemption is made on the ground that the owner, temporary or otherwise, of agricultural land should not be liable to two forms of taxation, land revenue and income-tax.

If we concede that a usufructuary mortgagee is not liable for income-tax in respect of the mortgaged land, provided that the land is agricultural, then the question referred to us amounts to this. Does it make any difference when by means of a lease, forming a single transaction along with the mortgage, the mortgagee restores possession to the mortgagor, and himself, in the form of rent, receives a sum equal to the land revenue plus interest at a definite rate? The answer to this depends on whether the result of the two deeds could have been effected *in toto* by a simple mortgage deed. My learned brother has shown that this was not the case. The result of the execution of the two deeds is fraught with consequences that would not attach to the execution of a simple mortgage deed. One transaction differs from the other not merely in form but in substance.

The Commissioner of Income-tax has not suggested in his reference to this Court that the transaction of a usufructuary mortgage and a lease was fraudulent, or colourable, or that the legal consequence of the execution of both deeds can be avoided on this ground; but he has referred to a decision of the Madras High Court in which this point is raised.

There can be no doubt that the decision by the Madras High Court was reasonably invoked by the Income-tax Commissioner. It appears, therefore, desirable to examine that decision both to see how it is on all fours with the present case, and, if so, on what grounds dissent from it should be expressed. The main distinction to my mind between the reference to the Madras High Court and this reference is that there was undoubtedly forwarded to the Madras High Court an expression of opinion, treated by the Madras High Court as a finding of fact, which is wanting in the reference to this Court. In that reference the Income-tax Commissioner had stated :

“ The income received or receivable by the capitalist is not income derived from land but income derived from the business of money lending. It appears to me that the taxing authorities and courts in such a case as this must look to the substance of the transaction. The source of the petitioner's income is his money-lending business, and the mortgage and lease back are merely devices adopted, partly to protect his capital and partly to secure his business from liability to income-tax. It is evident from the drafting of subsection 2 (1) of the Income-tax Act (XI of 1922), that the object of the exemption of agricultural income is to avoid subjecting the income from land to double taxation, once in the form of land revenue and once in the form of income-tax.”

On this reference the judgment of the Madras High Court was as follows :—"The finding of fact in this case necessarily involves that the question propounded in the reference should be answered in the negative." Now the question of fact found by the Madras High Court was presumably that the income assessed was not derived from land. If this finding had been stated without reasons, it would clearly have been a simple finding of fact and would have precluded the interference of the High Court. It appears that the Madras High Court treated the reference as containing such a finding of fact, and so it did not discuss the question of law referred to us. In the present reference, on the contrary, all questions that can be raised are left open.

It appears, however, to me desirable to state that if the terms of the reference and the decision of the Madras High Court are rightly reproduced in the publication placed before this Court, what was submitted to the Madras High Court was not merely a finding of fact but a finding of fact based upon an interpretation of the Income-tax Act, and on a certain proposition of law, from both of which it is necessary to express dissent. The Act does not make the distinction drawn in that reference between income derived from business and income derived from land. The business of money-lending may bring in an income, which is exempt from income-tax on the ground that it is derived from agricultural land. Nor again can the taxing authorities avoid an implication arising from the form of a transaction on the ground that, except for a desire to escape income-tax, the transaction would have taken a different form, which is what is meant in that reference by "looking at the substance of the transaction". It is not unlawful to, avoid, by any means not forbidden by law, rendering oneself liable to the payment of income-tax, though it is an offence by false return or by concealment to evade payment of income-tax. In this connection I would quote the remarks of Lord Cairns on the interpretation of a taxing statute.

"If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute". *Partington v. Attorney-General* (1).

For the above reasons I would concur in answering the question propounded in the affirmative.

BY THE COURT.—The order of the Court is that the annual payments made to the mortgagee in the circumstances mentioned in the reference are excluded from the assessment of the profits and gains of his business as being agricultural income. It would appear that this case has had three hearings. We fix Rs. 100 per day as fee for both sides. The assessee will have his costs from the Crown.

[217]IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Wallace and
Mr. Justice Beasley.

[8th December, 1927.]

A. Baboo Sahib and Sons, Erode
v.

.. Assesseees.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 10—Person conducting business with capital contributed by another—Remuneration by share of profits—No right of control or management and no liability for loss—Partnership, if constituted—Real ownership of business.

The assesseees were carrying on a tobacco business with one Babji Sahib who was to conduct the business, the entire capital being contributed by the assesseees and who was to get a 2/5th share of the profits in lieu of salary or commission. The books of the business were kept elsewhere at the assesseees' Head-quarters and Babji Sahib had nothing to do with the management or the accounts or with any loss in the business. The Income-tax Officer found that the business was the sole concern of the assesseees, Babji Sahib not being a partner therein and assessed them accordingly.

On a reference on the question whether the business was carried on in partnership,

Held, that the question was one of fact and that in the absence of other evidence, the mere fact that a person was remunerated by a share of the profits of a business would not make him a partner in it.

Case [Referred Case No. 7 of 1927] stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

In compliance with the order quoted above I have the honour to refer the following case for the decision of the High Court under section 66 (3) of the Indian Income-tax Act, 1922.

2. The petitioners Messrs. A. Baboo Sahib & Sons carry on business at Erode. For the assessment of the year 1925-26 they returned Rs. 12,770 as the income of the previous year as shown below and claimed a depreciation allowance of Rs. 701.

	Rs.
Property	1,023
Business in grain and paddy	7,804
Tobacco shop 3/5 share of profit and interest on capital ..	3,943
Total income ..	12,770

They added at the same time that the tobacco shop belonged to a firm of which they and one Babji Sahib were partners and that the tax on its profits would be paid by the firm. The return was supported by a Profit & Loss Statement prepared by Messrs N. C. Rajagopal & Co., a firm of accountants. The history of assessment of the tobacco business was as under :

The entire capital of the business was contributed by the petitioners. Till May 1924 the accounts of this business were kept in one set of books along with those of the petitioners' other business. In the assessment for 1923-24 Mr. Siromani who audited their accounts for income-tax purposes stated as follows: " The assesseees (Petitioners) advance money to three men : (1) Imam Din Sahib, (2) N. K. Gudu Sahib and (3) N. M. Babji Sahib. The above three

men have each an account for business conducted by them as regards purchases and sales, but the accounts for the three are maintained by A. Babu Sahib & Sons in their books. In each of his joint ventures A. Babu Sahib is entitled to $\frac{3}{5}$ of the profits or loss and the rest goes to the party who conducts the business. The three men are not paid either salary or any commission or any other benefit and in their place they get $\frac{2}{5}$ of the profits or loss. These three men have introduced no capital. Since the above men do get a share in place of salary or commission only the share credited to the account of A. Babu Sahib has been shown in the profit & loss account, but all the inadmissible items have been carefully excluded. In the ledger under joint account, signatures of the parties and A. Babu Sahib appear stating their terms and division of profit for the year." On the basis of this report and in the absence of a regular partnership deed the Income-tax Officer treated the business in tobacco as the sole business of the petitioners and assessed them on the profits derived from it. The petitioners acquiesced in the assessment. In the subsequent year 1924-25 the petitioners claimed that the tobacco business was conducted by a partnership. The Income-tax Officer who called for and examined the evidence adduced by them held that the alleged partner was a mere agent remunerated by a share of the profits for the work done by him and that the business was the sole concern of the petitioners. He therefore taxed the petitioners on the income of this business along with their other income. The petitioners submitted to the assessment without protest.

In the year now in question, viz., 1925-26 the auditors who examined the petitioners' accounts observed as follows:—"We understand that this shop is run by Messrs. A Babu Sahib & Sons in partnership with Mr. M. N. Babji Sahib sharing the profits in the proportion of $\frac{3}{5}$ and $\frac{2}{5}$ respectively." This statement indicated that the accounts by themselves did not conclusively show the existence of a partnership. As no fresh materials or evidence, from which the essentials of a partnership could be inferred, were produced before him, the Income-tax Officer held that the petitioners had not proved their plea of partnership and that the business in tobacco was their own. He accordingly assessed them as under:—

	Rs.
Property	1,023
Business—Paddy	9,266
Grains (loss)	—637
Tobacco	5,027
Goat skins	3,000
Net taxable income	17,679
Share of income from a partnership in grain trade	5,500
Total income	23,179

The petitioners appealed to the Assistant Commissioner against the assessment and contended *inter alia* that the tobacco business carried on by them with Babji Sahib was a partnership concern. The Assistant Commissioner, however, agreed with the Income-tax Officer's finding that the petitioners had not proved their plea by production of any satisfactory evidence. He, however, reduced the income adopted under this head by allowing a deduction of Rs. 1,084 being the share of profits paid to Babji Sahib on the ground that it should be treated as expenditure incurred by the petitioners in earning their profits.

The petitioners then applied to my predecessor under section 66 (2) of the Income-tax Act and required him to state a case for the decision of the High Court. He refused to do so on the ground that in the absence of a partnership deed the question whether there was or there was not a partnership was one of fact and on the finding in the case, no question of law arose.

The petitioners thereupon moved the High Court under section 66 (3) of the Income-tax Act and by its order quoted above I have been directed to refer the following question for its decision.

“Whether on the admitted facts and findings that the assessee and Babji Sahib have been carrying on joint continuous business, the one contributing the entire capital and the other labour and skill and have divided the profits in the ratio of 3 : 2, the legal relationship between the parties is not that of partners, or a partnership is not constituted between the parties.”

3. I am of opinion that on the evidence adduced by the petitioners and the statements made on their behalf in connection with their assessment to income-tax the relationship between them and Babji Sahib is not that of partners in a firm. The only evidence that the petitioners produced in support of their plea was the account books maintained for the business which showed that Babji Sahib was paid a share of profits, presumably as remuneration for the services rendered by him in managing the business. Under section 242 of the Indian Contract Act no contract for the remuneration of a servant or agent of any person engaged in any trade by a share of the profits of the trade shall of itself render such servant or agent responsible as a partner therein or give him the rights of a partner. In the present case the petitioners did not adduce any evidence to prove that Babji Sahib had undertaken to bear losses or that he had a voice in determining the policy of the business. On the other hand all the circumstances indicated that the petitioners were the real owners of the business and that Babji Sahib was only their agent remunerated by a share of profits.

V. Ramaswami Aiyar, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

In this case the issue was whether the tobacco business which was carried on by the assessee, was or was not carried on in partnership with one Babji Sahib. The true relation between the parties was that Babji Sahib conducted the tobacco business, that he was paid a two-fifths share of the profits of that branch but that the books relating to the whole tobacco business were kept in the assessee's head office and that except presumably for the purpose of examining them to test whether he was receiving his right share of the profits he had nothing whatever to do with the accounts; and he had nothing to do with the management of the business. How any one could contend that the fact that the books of this branch were kept elsewhere is not rebutting evidence, conceding for the moment that remuneration by a share of the profits is *prima facie* evidence of partnership, passes my comprehension. That rebuttal having been given, the next step would be that the assessee might have proved that he had a share in the losses which, though not a necessary feature of partnership even in England, is very strong *prima facie* proof of the subsistence of that relation. That he did not choose to do. He put in the fact that he was remunerated by a two-fifths of the profits and as to the rest was absolutely silent. We are of opinion that this is a pure question of fact, that there were materials both ways and that the significance of remuneration by a share of the profits is very much less in this country than it would be in England, because out here, as was pointed out in the

course of the argument, one constantly has what are called working partners who really are merely *gumastas*, but are paid not a fixed salary but one in proportion to the business done, no doubt in order to give them a stimulus to conduct the business efficiently. By section 242 of the Contract Act it is enacted as follows :—

“ No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.”

The argument that before that section can apply at all the person must be definitely shown to be a servant or an agent and nothing else, leads to the conclusion that the section is absolutely *otiose* because it merely in that case would amount to saying that no person who is not a partner shall be a partner. The real explanation is surely that, when a person is acting in the position in which a servant or agent of another person would act, then the mere fact that you ascertain that he is remunerated by a share of the profits of the business that passes through his hands does not make him a partner. That being so, I think that is a clear indication in the Indian Statute that in this country at any rate the position of the present assessee is absolutely unmaintainable and that if he wishes to clinch the matter in his favour he must call evidence which can throw light on the whole of the surrounding circumstances of the association, whatever it was, between the assessee and Babji Sahib. This reference must be dismissed with Rs. 250 costs.

[218] IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Wallace
and Mr. Justice Beasley.

[8th December, 1927.]

M. T. T. K. M. M. S. M. A. R. Somasundaram
Chettiar

.. Assessee.*

v.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 10 (2) (iii)—Assessee carrying on British Indian and foreign money-lending business—Sums borrowed in British India used as capital for foreign business—Interest thereon, if deductible in assessment of British Indian business profits—“The business”, “Capital borrowed for the business,” meaning of.

Where an assessee carrying on money-lending business in British India and at Ipoh in Federated Malay States, borrowed money in Madras which was sent out to Ipoh and used there as capital of the business, the interest paid on the amounts borrowed and remitted to Ipoh is not deductible in the assessment of the profits of the British Indian business under Sec. 10 (2) (iii) of the Income-tax Act.

The expression “the business” in Sec. 10 (2) (iii) means the business whose profits are being assessed to income-tax in British India and the deductions claimable thereunder are such deductions as represent sums of money necessary to be paid out to earn the very profits which are to be taxed.

Obiter.—The expression “Capital borrowed for the purposes of business” in Sec. 10 (2) (iii) means capital borrowed and used for the purposes of the business.

Case [Referred case No. 6 of 1927] stated under section 66 (3) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

* (1928) 54 M.L.J. 436; 27 L.W. 432; A.I.R. (1928) Mad. 487.

CASE.

In pursuance of the order quoted above I have the honour to refer the following case to the High Court under section 66 (3) of the Income-tax Act, 1922.

2. The petitioner, Somasundaram Chettiar is a banker carrying on business at Madras, Devakottai, Thonze (Burma) and Ipoh (Federated Malay States). The businesses at these places are distinct, and separate accounts are maintained for each of them. The business at Madras is admittedly conducted with borrowed money, the petitioner having no capital of his own at that place. Some borrowed money is also utilised in financing the Thonze and Ipoh businesses. The petitioner is treating the money invested in his Thonze and Ipoh businesses as 'loans' advanced by him, and in ascertaining the profits or gains of his Madras business he takes credit for the interest due to him on these 'loans'. For the assessment of the year 1925-26, based on the income derived by him during the Tamil year Rakthakshi (13-4-24 to 12-4-25), the petitioner returned his income as Rs. 22,361 as follows :—

				Rs.
Business :	Madras	..	..	1,543
	Thonze	..	..	23,578
	Devakottai loss	..	..	—2,760
			Total ..	25,121

His accounts were called for and examined. Those relating to the Madras business showed that in arriving at the profits of the business the petitioner did not take credit for the interest due from his Ipoh business, though he took credit for the interest due from Thonze. On the other hand the petitioner claimed a deduction of Rs. 34,672 as interest paid on sums borrowed by him in Madras which included sums advanced by him to his business at Ipoh. The capital sum due by Ipoh amounted to Rs. 60,342 at the end of the year of account. In the circumstances two courses were open to the Income-tax Officer : either (1) to include the interest due from Ipoh but not taken credit for by Madras as interest received from Ipoh (in fact the Ipoh accounts showed that the interest due to Madras, Rs. 6,400, was paid by adjustment in the year of account 1924-25, though the Madras shop took credit for it in the subsequent year), or (2) to disallow part of the interest paid by Madras on moneys borrowed by it in the proportion that the sums advanced to the Ipoh business bore to the total borrowed capital. The Income-tax Officer adopted the latter course and computed the interest so paid on behalf of the Ipoh business at Rs. 5,427. He disallowed the interest payment to that extent and fixed the profits of the Madras business at Rs. 9,729. To this the Income-tax Officer added the other income of the petitioner and assessed him as under :—

Business :	Madras	..	..	9,729
	Thonze	..	..	24,117
				33,846
	Devakottai loss	..	..	1,542
				32,304
Property		..	..	416
			Taxable income ..	32,720

The profits and gains derived by the petitioner from his business at Ipoh were not taken into account in the assessment as they were not found to have been received in British India.

The petitioner appealed to the Assistant Commissioner and contended that the sum of Rs. 5,427 disallowed by the Income-tax Officer in arriving at the profits of his Madras business should be allowed as a deduction. The Assistant Commissioner held that the Income-tax Officer was right in disallowing the payment when arriving at the profits of the Madras business and dismissed the appeal.

The petitioner then applied to my predecessor under section 66 (2) of the Income-tax Act and required him to refer certain questions for the opinion of the High Court. This the Commissioner refused to do on the ground that no question of law arose.

Thereupon the petitioner moved the High Court under section 66 (3) of the Income-tax Act and the High Court in its order quoted above has required me to refer the following two questions :

(i) Whether the operation of section 10 (2) (iii) is excluded merely because the capital borrowed is also utilised in foreign business :

(ii) Whether the construction put on section 10 (2) (iii) by the Income-tax authorities is not too restricted.

3. *Question (i)*—I am of opinion that under section 10 (2) (iii) of the Income-tax Act, an assessee is not entitled to claim a deduction of the interest paid on sums borrowed by him when the business for which he uses these sums is not the subject of assessment. Under section 10 (1) the tax is payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him. Under sub-section (2) of that section such profits or gains are computed after making the allowances referred to therein, one of which is "in respect of capital borrowed for the purposes of the business . . . the amount of the interest paid"—Sub-clause (iii). The term "the business" occurring in this sub-clause means the business, the profits and gains of which are liable to pay tax under section 10. The only point for consideration then is whether all the money borrowed by the petitioner and shown in his Madras books was used in furtherance of the business carried on in Madras, the profits of which alone have been taxed. This has been found by the Income-tax authorities against the petitioner. The money borrowed in Madras was not wholly utilised for the Madras business. A part of it was used in the Ipoh business. If it had been necessary to compute the Ipoh profits with a view to taxing them as profits received in British India, interest paid on capital utilised at Ipoh would have been brought into the computation. But in this assessment no such computation has been made and the Ipoh profits have not been taxed.

4. *Question (ii)*—I do not consider that the interpretation put upon section 10 (2) (iii) is too restricted; it appears to me to be the natural and equitable construction. When a man conducts two businesses, the profits of each business should be computed separately having regard to the capital employed in that business. He cannot be allowed to show a reduced sum as the profits of one business by debiting to that business the interest on capital borrowed for the purpose of the other business. On any other view an assessee who borrows money in British India and uses it partly in his British Indian business and partly in his foreign business would be able to set off the whole of his interest payments against his British Indian profits. The profits earned in British India would thus escape taxation, either wholly or in part, while the foreign profits, which by the use of this device would be artificially swelled,

could only be taxed if they were so treated as to fall within the purview of section 4 (2) which the assessee, in the hypothetical case mentioned, would naturally avoid doing if possible.

K. S. Krishnaswami Ayyangar, and *R. Kesava Ayyangar*, for the assessee.
M. Patanjali Sastri, for the Crown.

JUDGMENT.

THE CHIEF JUSTICE :—In this case there was carried on a business by a Nattukottai Chetti at various places of which the only two relevant ones are Madras where his head office was and Ipoh, a place in the Federated Malay States. The short point is this. Money was borrowed by the assessee in Madras and of course interest had to be paid on it in Madras. Part of that money—it does not matter how much because that is a question of fact for the Commissioner who has found a figure—was in effect sent out to Ipoh and was used as capital in the conduct of the Ipoh business. Apparently in all the businesses this gentleman relied on borrowed capital and not his own. Deductions are claimed in this case in respect of the interest paid by the assessee to the persons from whom he borrowed his capital and the Commissioner has given effect to those deductions so far as they affect the branches in British India, but he disallowed the deduction in respect of the interest paid on such sums of money as were remitted for capital to the Ipoh branch, a sum in all of Rs. 60,000.

The words of the section are.—“Such profits or gains (i.e., the taxable profits or gains of the business) shall be computed after making the following allowances” and then comes (iii) “In respect of capital borrowed for the purposes of the business where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid”.

The only words that it is necessary to consider for the purpose of this case are the words at the beginning “in respect of capital borrowed for the purposes of the business”. The question is, can this capital be said to be borrowed for the purposes of “the business?”. What is the business? Obviously the business whose profits are being assessed to taxation, the whole scheme of the section as I understand it being that the deductions to be made are such deductions as represent sums of money which it is necessary to pay out in order to earn the very profits which are under review to be taxed—such as any rent paid for the premises in which such business is carried on and repairs. I put it to Mr. K. S. Krishnaswami Ayyangar whether he would seriously contend that repairs to the place of business in Ipoh or rent paid for office there in Ipoh were legitimate deductions here. The answer is obvious, that of course they cannot be. This appears to be *ejusdem generis* for the reason that “the business” is only the business in British India the income of which alone is liable to be taxed. With the argument that the capital borrowed for the purposes of the business will include any sum of money which at the moment it was borrowed was put into the coffers of the particular business in British India and that therefore it did not matter if the whole of it was taken out next day and sent to China, I do not think it is really necessary to deal because it must be taken when a business man borrows money on which he has to pay interest and at once remits it or part of it to the Ipoh branch, that the object of borrowing the money was to finance *qua* that sum, the Ipoh branch and I may add that, if necessary, I should be prepared to hold that the only reasonable construction of the section is to construe “capital borrowed for the purposes of the business” as meaning capital borrowed and used for the purposes of the business.

The next and much more attractive way of putting it was this : that the business carried on in Madras was in one of its ramifications the business of financing the Ipoh branch; but then that would involve, I think, that to treat the business as of that nature in Madras it will be necessary to find that all the profits of the Ipoh branch were automatically remitted to Madras and came here and that the Madras office was notionally running in its Madras office the business at Ipoh. There is no evidence of that at all; on the contrary the finding of the Commissioner is that no part of the profits made during this year at Ipoh were sent from Ipoh to Madras. As my brother Beasley pointed out in the course of the argument, no doubt what will doubtless happen will be that when the three years defined by section 4 (2) of the Act have elapsed the profits will be sent to British India, as by then they will not be obnoxious to the tax. However that is what the Act permits and the Income-tax Officers are powerless to prevent it. But to allow deductions in respect of interest on borrowed capital in such a state of affairs as we have to consider here would be to my mind inconsistent with the whole tenour and language of the Act and in my view "the business" means the business whose profits are being assessed, and whose profits are being assessed, moreover, in the year under consideration. In my opinion this reference has no substance in it and should be dismissed as it raises no arguable question of law. The Crown will have its costs Rs. 250.

[219] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice Mr. Justice C. C. Ghose and Mr. Justice Buckland.

[13th December, 1927.]

The Howrah Amta Light Railway Co., Ltd. . . . Assessee.

v.

The Commissioner of Income-tax, Bengal . . . Referring Officer.

Income-tax Act (XI of 1922), Sec. 10 (2)—Howrah Amta Light Railway Co.—Agreement with District Board granting special privileges—Moiety of excess profits over interest on capital payable to Board—Assessment of Company's profits—Payments to Board, if permissible deduction.

Under an agreement entered into for the construction of a railway by the District Board of Howrah with the Howrah Amta Light Railway Co., Ltd., the Company was granted the free use of certain roads and exemption from payment of road cess. It was provided in the agreement that when the net profits of the Company should be in excess of 4 per cent. upon its capital, the surplus profits were divisible between the Company and the Board in equal moieties. On an assessment to income-tax, the Company claimed that a sum of Rs. 1,09,366 paid to the Board as the latter's share of surplus profits under the agreement was a permissible deduction in the computation of its assessable profits under Sec. 10 (2) (i), (viii) or (ix) of the Income-tax Act.

Held, that the amount paid to the Board was not a permissible allowance under Sec. 10.

Obiter : Having regard to the right of the assessee to be dealt with according to their own method of accountancy, Sec. 10 (2) of the Act is not to be assumed as an exhaustive list of permissible deductions.

Case stated under section 66 (3) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

CASE.

In accordance with the Honourable High Court's Order in Civil Rule No. 925 of 1926, forwarded to me with M. No. D-10999, dated the 6th December 1926, of the Appellate Side, I have the honour to submit the following case for the decision of the Honourable High Court.

2. The following are the facts of the case :—On 9th July 1925 the Howrah-Amta Light Railway Co., Ltd., submitted a return under section 22 (1) with a statement of net income of the Company for the year 1924-25 and in this return it showed its profits after deducting the amount of Rs. 1,09,366, paid to the Howrah District Board in accordance with an agreement with the Board. But the Income-tax Officer did not accept this and added back the amount of this payment in arriving at the total assessable income of the Company. Objecting to the assessment, the Company filed an appeal before the Assistant Commissioner on 22nd December 1925 urging that the amount of Rs. 1,09,366, being half the net profit in excess of the first 4 per cent. on the capital is the property of the District Board and as such, under section 4 (3) (iii) of the Income-tax Act (XI of 1922), is exempt from income-tax. During the hearing of the appeal it was urged that the amount was a necessary item of expenditure as defined in section 10 (2) (ix) and that it was either cess or rent or in lieu of cess or rent and thus was an allowable item of expenditure under section 10 (2) (i), or 10 (2) (viii). The Assistant Commissioner rejected the appeal on 12th February 1926. Subsequently on 11th March 1926, the Company filed a petition before the Commissioner for review of the assessment under section 33 or in the alternative for reference to the High Court “for determination of the points involved in this case namely :—

- (1) Whether the assessment is in order.
- (2) Whether the whole or any part of the amount paid to the District Board is or is not an allowable item of expenditure under section 10 of the Act.
- (3) The legal relation subsisting between your petitioners and the District Board and the character of the payment by your petitioners to the Board ”.

3. I passed orders on 16th April 1926 refusing to state the case on the ground that no point of law appeared to be in doubt. On the 15th September the Honourable High Court issued the Rule Nisi No. 925, dated the 24th August 1926, calling upon me to show cause why I should not state the case. In my Letter No. 2710-C T., dated the 27th September 1926, to the Registrar, High Court, Appellate Side, I stated that on reconsideration I decided to state a case and the rule was accordingly made absolute. I therefore refer under section 66 (3) the points of law raised in the petition under section 66 (2) filed before me mentioned in paragraph 2 above with my opinion which is as follows :—

- (1) The assessment is in order, as
- (2) The amount paid to the District Board is paid out of profits and is contingent on the profits exceeding a certain figure. As such, it would be a stretch of imagination to describe it as a local rate, or in lieu of a local rate, such rates being payable whether a profit is made or not, or as expenditure incurred solely for the purpose of earning such profits or gains. It is therefore not an allowable item of expenditure under section 10 of the Act.
- (3) As regards the 3rd point of law, although I discussed this point in my original order refusing to make a reference, it appears to me that it is not my place to define the legal relationship subsisting between the petitioner Company and the District Board.

Agreement between the District Board of Howrah and T. J. Walsh and others, dated 12th June 1889.

An agreement made this 12th day of June 1889 between the District Board of Howrah incorporated under the Bengal Local Self-Government Act of 1885 (and hereinafter called “the Board”) of the one part and Theodore Jackson Walsh, William Lovett and Samuel David Tallerman, members of the

firm of Messrs. Walsh Lovett and Company of Calcutta, Engineers at present residing in England (hereinafter called the Promoters) for and on behalf of a Company about to be formed and to be called the "Bengal District Board Tramways Co., Ltd.," (hereinafter called "the Company") of the other part : Whereas the Promoters are desirous to promote the construction of a Tramway to be worked by steam-power from Howrah to Amta via Jagatballavpur and have applied to the said Board for a concession to the Company of the right to construct and work such Tramway through that portion of the road between Howrah and Amta which passes through the area under the jurisdiction of the said Board and the said Board have granted such concession (provisionally on the same being sanctioned by the Government of Bengal) upon the terms and conditions hereinafter set forth.

Now these presents witness that it is hereby mutually agreed as follows:—

1. The Board will grant the Company the free use of as much of the said portion of the said road as is necessary (but not exceeding six feet wide and on one side of the road only) for the purpose of laying thereon a Steam Tramway of two feet gauge to be worked by the Company.
2. The Board will promote the acquisition by the Company under the provisions of Act X of 1870 of such additional land as may be necessary for the purpose of the Tramway.
3. The Board will for a period of twenty-one years with power of renewal exempt the Company from the tax on account of road-cess if the law and the Government so allow or will exact only a nominal tax.
4. So soon as five miles of the Tramway shall have been constructed and declared open to the public the Board shall (whether such portion of the Tramway so constructed and declared open as aforesaid shall be within the area under the jurisdiction of the said Board or not) pay to the Company as and by way of interest on the capital expended by the Company any sum or sums of money which may be required to make the net profit of the Company equivalent to Rs. 850 per annum per mile of Tramway constructed and declared open : Provided that the provisions of this clause shall not involve the Board in a greater liability to the Company than Rs. 22,000 per annum, and shall not be applicable to any mile of the Tramway upon which rails have not been laid and the line declared open to the public.
5. If and whenever the net profits of the Company in respect of the said Tramway from Howrah to Amta shall be in excess of 4 per cent. upon the capital for the time being of the Company such surplus profits shall be divided between the Company and the Board in equal moieties.
6. In the event of the Board exercising in conjunction with the District Board of Hooghly and the Municipality of Howrah the right of purchase conferred upon them by section 41 of Act 3 of 1883 (B.C.) the value to be placed upon the Tramway shall be calculated by adding to the value of the whole Tramway from Howrah to Amta with all its equipments as a dividend-earning investment a bonus of 20 per cent. over and above such value : the said value in case of dispute to be determined by arbitration under the clause in that behalf hereinafter contained.
7. The Company to be formed shall be one of limited liability registered under Act VI of 1882 and all matters connected with the Tramway shall be dealt with by Directors of whom one in six shall be nominated by the Board.
8. The greater part of any remuneration which the Company may agree to pay any Agents whom it may appoint over and above a fair allowance for office expenses shall not be in the form of a fixed payment but in that of a commission on net profits.

9. The Company shall widen and raise the level of the road whenever necessary, it being understood that a clear roadway of fourteen feet exclusive of the six feet required for the Tramway shall be left intact for ordinary wheel traffic.

10. The necessary level sections, plans and designs as required by the Government shall be prepared by and at the expense of the Company.

11. The Company shall construct new bridges and culverts, widen and fortify existing bridges and culverts whenever necessary.

12. The Company shall wherever possible avoid running their line through bazaars and village.

13. The Company shall construct, maintain and repair all works connected with the Tramway with materials of the first class quality to be approved by Government.

14. If any doubt or difference shall arise between the Board and the Company concerning anything herein contained on any matter in any way connected therewith or with these presents or the construction thereof or of the rights, duties and liabilities of any person or persons in connection with these presents or as to the incidence of expense as between the Board and the Company under any of the clauses of this Agreement, then and in every such case the matter in doubt or difference shall be referred to two arbitrators, one to be appointed by each party or by the umpire of such arbitrators in case they differ in opinion. But if either party shall refuse or neglect to appoint for one month after notice in writing from the other of an arbitrator being or having been appointed then the arbitrator so appointed may make a final decision alone which shall have the same force and effect as the award of two arbitrators or their umpire duly appointed.

15. Upon the adoption of this Agreement by the Company in such manner as to render the same binding on the Company the Promoters shall be discharged from all liability in respect thereof.

16. Unless within twelve months after the sanction of this Agreement by the Government of Bengal the Company's capital shall have been fully subscribed either of the parties hereto may by notice in writing to the other rescind this Agreement and after adopting this Agreement the Company shall stand in the place of the Promoters for the purposes of this clause.

17. If this Agreement shall not be adopted by the Company in manner aforesaid within three months after the sanction thereof by the Government of Bengal either of the parties hereto may by notice in writing to the other rescind the same.

18. The rescission of this Agreement under clauses 16 and 17 shall not give rise to any claim for compensation express or otherwise.

JUDGMENT.

RANKING, C. J.—In this case the Commissioner of Income-tax has been ordered to state and has stated three points for the opinion of the Court. The first question is—Whether the assessment is in order. I do not understand that there is any meaning in particular in that passage but the assessment is plainly in order. The second and the only point is this—“Whether the whole or any part of the amount paid to the District Board is or is not an allowable item of expenditure under section 10 of the Act”. The third question which apparently he was ordered by a rule issued by this Court to state is not a question at all. It is as follows: “The legal relation subsisting between your petitioners and the District Board and the character of the payment by your petitioners to the District Board”. The Commissioner of Income-

tax has in the end said what it appears to him that it is not his place to define the legal relationship subsisting between the petitioner Company and the District Board. I respectfully agree and I am personally sorry that any rule was ever issued or made absolute calling upon the Commissioner of Income-tax to state something which was not a question at all. I therefore propose to confine my attention to the second question which I have stated and that question takes its meaning from the circumstance that the Howrah Amta Light Railway Company, Limited, was apparently constructed in or about 1889 pursuant to an agreement between the District Board of Howrah and certain other persons called the "Promoters", dated the 12th of June 1889. By that agreement the Board granted to the Company the free use of as much of the portion of a certain road as was necessary for the purpose of laying thereon a Steam Tramway of two feet gauge to be worked by the Company. It was agreed by Clause 3 that the Board would for twenty-one years exempt the Company from the tax on account of road-cess if the law and the Government so allowed or would exact only a nominal tax. The Board further promised, so soon as five miles of the tramway should have been constructed and declared open to the public to pay to the Company any sum which might be required to make the net profit of the Company equivalent to Rs. 850 per mile. It is the fifth clause which is the most important: "If and whenever the net profits of the Company in respect of the said Tramway from Howrah to Amta shall be in excess of 4 per cent. upon the capital for the time being of the Company, such surplus profits shall be divided between the Company and the Board in equal moieties."

Now the second question to which I have referred has reference to the sum which the Tramway Company—The Light Railway—has to pay to the District Board, as being one half of the surplus profits in excess of four per cent. upon the capital for the time being. In my judgment this is a typical case in which to apply the well settled principles that the destination of profits has got nothing to do *prima facie* with the question whether they are liable to income-tax. What may be done with the profits after the tax has been paid upon them is a different matter, but the question is whether the Company in this case is liable to pay income-tax upon the profits, or only upon that part of its profits which it does not hand over to the District Board under clause 5.

In my opinion the attempt to bring this case under any of the sub-heads of sub-section (2) of section 10 of the Act cannot succeed. In view of the fact that for the purpose of income-tax assesses have a right to be dealt with according to their own method of accounting I desire to guard myself from assuming that sub-section (2) of section 10 is intended as an exhaustive list of deductions which are permissible for the purpose of income-tax. But in the present case an attempt is made to bring it under one or other of the three divisions of sub-section (2). It is said first of all that this payment under clause 5 comes under the head of "rent paid for the premises". In my opinion it is certainly not "rent". Again it is said that it comes under the head "Sums paid on account of local rates." In my opinion it is not a sum paid on account of local rates. No. (ix) is "any expenditure" (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains". In my judgment the Commissioner of Income-tax has very properly held that this is not a description which covers the money in question. The payment to the District Board is not an expenditure incurred solely for the purpose of earning the Tramway Company's profits.

However this matter is looked at, I am of opinion that the Commissioner of Income-tax has correctly decided the only question which arises, which is second of the three questions stated. In my opinion the answer to that question is in the negative.

I think in these circumstances that the assessee must pay the costs of this reference.

GHOSE, J.—I agree.

BUCKLAND, J.—I agree and have nothing to add.

[220] IN THE HIGH COURT OF JUDICATURE AT MADRAS.
Before Sir Murray Coutts Trotter, Kt., Chief Justice, Mr. Justice Beasley and
Mr. Justice Anantakrishna Ayyar.

[14th December, 1927.]

P. Thiruvengada Mudaliar

.. Assessee.*

v.

The Commissioner of Income-tax, Madras

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 66 (2) and (3)—Application to the High Court for reference—Question of law not raised before Commissioner in application under sec. 66 (2)—Jurisdiction to direct Commissioner to refer such question.

On an application under Sec. 66 (3) of the Income-tax Act, the Commissioner of Income-tax cannot be required by the High Court to state a case on a question of law not raised before him in an application under Sec. 66 (2) within the time limited thereunder.

In re, Lalla Mal Hardeo Das Cotton Spinning Mills. 1 I.T.C. 266; *In re, Makham Lal Ram Sarup*, 1 I.T.C. 416, followed.

Case [Referred Case No. 16 of 1927] stated under section 66 (3) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Madras, for the opinion of the High Court.

CASE.

In accordance with the order quoted above I have the honour to refer the following case for the opinion of the Hon'ble the Judges of the High Court.

2. The petitioner is P. Thiruvengada Mudaliar of Madras. His chief source of income is that derived as ship dubash of Messrs. Volkart Brothers.

3. For the assessment of the year 1924-25 he returned an estimated income of Rs. 10,000 under the head "Business".

4. The petitioner appeared in response to the Income-tax Officer's notice under section 23 (2) of the Income-tax Act but failed to produce any accounts or other evidence to substantiate his return. His Solicitor, Mr. Greator, suggested to the Income-tax Officer that Rs. 15,000 would be a reasonable estimate of his income from business. The Income-tax Officer estimated the income from this source to be Rs. 16,000 and completed the assessment on 26th August 1924. Mr. Greator accepted the assessment.

5. In the course of the assessment for 1925-26 the Income-tax Officer received trustworthy information about the extent of the petitioner's business, and was satisfied that the petitioner had materials from which his income from business could have been ascertained and that by withholding those materials he had managed to conceal a large part of his real income and had been under-assessed.

6. The Income-tax Officer therefore proposed to assess the profits and gains that in his opinion had escaped assessment in 1924-25 and served on

* A. I. R. (1928) Mad. 889; 27 L.W. 729.

the petitioner a notice under section 34 calling on him to make a return of the income derived during the year of account 1923-24.

7. The petitioner made a return and after hearing the evidence produced by him in support of it, the Income-tax Officer made the assessment under sections 23 (3) and 34 on 18th February 1926.

8. The petitioner filed an appeal to the Assistant Commissioner against this assessment but it was dismissed.

9. The petitioner then required the Commissioner to take the opinion of the High Court under section 66 (2) on the following questions of law :—

(a) Whether in the event of the assessee's estimate of income not being accepted by the Income-tax Department, whether without legal evidence conjectures on the part of the First Income-tax Officer could be the basis for taxation.

(b) Whether the Income-tax Officer's estimate should not be founded upon definite evidence disclosed to the assessee and

(c) Whether the assessee should not be given an opportunity of disproving the correctness of the information received by the Taxing Officer and upon which he proposes to act.

The Commissioner held that no question of law arose and dismissed the application.

10. The petitioner thereupon moved the High Court under section 66 (3) of the Income-tax Act to direct the Commissioner to state a case on certain questions propounded by him in his notice of motion.

11. On 9th February 1927 when the proceedings referred to in the preceding paragraph were pending before the High Court, the petitioner filed another application before me and contended that the original assessment made on the 26th August 1924 was made by negotiations between Mr. Greatorox on behalf of the assessee and the Income-tax Officer and that the Income-tax Officer had no power to take proceedings under section 34 and make a fresh assessment in February 1926. He requested me to cancel the latter assessment and in the alternative to refer to the High Court the question whether the Income-tax Officer was entitled in the above circumstances to act under section 34. I considered that there was nothing to prevent the Income-tax Officer from taking action under section 34 in the circumstances referred to above and as the petitioner's application under section 66 (2) had already been disposed of and as there was no provision of law which could entitle an assessee at that stage to require me to state a case to the High Court, I refused to do so.

12. The petitioner then applied to the High Court to amend his original application by substituting a new question of law in the place of those that he had already propounded. The High Court has now called on me to refer the following question : Where in the absence of accounts assessment was levied at an agreed figure as the result of negotiations by and on behalf of the assessee and the Income-tax Officer, whether the said assessment can be reopened under section 34 on the same state of affairs, viz., 'absence of accounts' or by raising the same question in other words.

13. Before I proceed to give my opinion on the question that I have been directed to refer, I respectfully request their Lordships to decide the preliminary question whether the petitioner is entitled to move the High Court for a direction to the Commissioner to refer a question of law which was not raised before the Commissioner in the course of proceedings under sub-section (2) of section 66 of the Income-tax Act. The application presented to me on 9th February 1927 was not a valid application under that sub-section. I

have already raised this question in my reference to the High Court on the petitioner's assessment for 1925-26 (Referred Case No. 3 of 1927).

14. In my view the question that I have been directed to refer should be answered in the affirmative. It is not unusual for an Income-tax Officer to lay before an assessee the details of a proposed assessment and invite him to state whether he agrees to the figures. Such agreement is not recognised by the statute and does not bar the assessee's right to appeal. The object of this procedure is merely to clarify the issues and to prevent, as far as possible, appeals due to mere misunderstanding on either side. This was done in the present instance and Mr. Greatorex on behalf of the assessee signified that he agreed to the adoption of the figure Rs. 16,000 as the income from business of the year of account 1923-24. There is nothing in these facts to support the theory of "assessment by negotiation" or to fetter the Income-tax Officer's legal right to take proceedings subsequently under section 34 on receipt of fresh information.

Nugent Grant and O. Thanikachalam Chetti, for the assessee.

M. Patanjali Sastri, for the Crown.

JUDGMENT.

The assessee moved the Commissioner of Income-tax, Madras, to refer to the High Court certain questions of law which he alleged arose in connection with the assessment made by the Income-tax Commissioner. The Income-tax Commissioner being of opinion that no question of law in connection with the said assessment arose declined to make any reference. Thereupon the assessee moved the High Court and the High Court by its order, dated the 9th March 1926 directed the Income-tax Commissioner to state a case on three points mentioned in that order. Subsequently the assessee moved the High Court to add a fourth point on which the Commissioner should be directed to state a case, the fourth point being, "Where, in the absence of accounts, assessment was levied at an agreed figure as the result of negotiations by and on behalf of the assessee and the Income-tax Officer, whether the said assessment can be reopened under section 34 on the said state of affairs, namely, absence of accounts or by raising the same question in other words." The High Court by its order, dated the 25th April 1927, ordered that the Income-tax Commissioner should state a case with reference to the fourth point also. When the case went back to the Income-tax Commissioner the learned Commissioner raised a preliminary objection to his stating a case with reference to the fourth point. The preliminary objection to this reference taken by the Commissioner of Income-tax is that the question of law sought to be argued here is one which was not argued before him and that it cannot now be raised by reason of section 66, sub-section 2 of the Income-tax Act which permits the assessee to apply within one month of the passing of the order under sections 31 and 32 of the Act to the Commissioner to refer questions of law to the High Court; and upon his refusal to state the case to apply to the High Court for an order directing the Commissioner to refer the case. It is admitted that the assessee did not raise before the Commissioner the question of law he seeks to argue here, *viz.*, question No. 4, within one month of the passing of the Assistant Commissioner's order under section 34 of the Act. He raised the other questions of law arising in the other three questions but not this one and the Commissioner now contends that the assessee cannot be heard upon this question. The facts of the case are that in the previous year's assessment the assessee was assessed at a figure which the Income-tax Officer subsequently considered to have been too low and he accordingly proceeded to re-assess him under section 34 increasing the assessment in the

previous year. The only questions here are whether the assessee is bound to raise before the Commissioner in his application to him all questions of law relied upon by him and whether he can get a reference upon a question of law not raised by him before the Commissioner. We are clearly of opinion that he cannot do the latter. Under section 66 (2) of the Income-tax Act the Commissioner may be required by the assessee to refer any question or questions of law arising upon the order. It is, we think, beyond doubt that that can only mean any question of law then raised before the Commissioner, not any question of law which the assessee may deem to be an arguable one thereafter. This view is also taken by the Allahabad High Court, *In the matter of Lalla Mal Hardeo Das Cotton Spinning Mills* (1) and *In the matter of Makham Lal Ram Sarup* (2). If the point of law is not raised before the Commissioner within the time specified by section 66 (2), it cannot be raised at all and the Commissioner cannot be required to state a case raising that point. This is not an appeal to the High Court. No appeal to the High Court is given by the Act. Questions of law and not of fact may be referred to the High Court but only subject to the provisions of section 66, sub-section 2, which only allows a reference upon such points of law as have been raised before the Commissioner within one month of the passing of the order.

The preliminary objection of the Commissioner to a reference on question (4) succeeds and as the assessee does not propose to argue the other three questions referred it is not necessary for us to pass any orders except to order the assessee to pay the costs of the Commissioner which we fix at Rs. 250.

[221] IN THE HIGH COURT OF JUDICATURE AT LAHORE.

Before Sir Shadi Lal, Kt., Chief Justice and Mr. Justice Bhide.

[22nd December, 1927.]

Messrs Khushi Ram Karam Chand

.. Assessee.*

v.

The Commissioner of Income-tax, Punjab

.. Referring Officer.

Income-tax Act (XI of 1922), Secs. 22 (4), 23 (3) and 34—Submission of return and enquiry thereon—Subsequent notice to produce accounts under Sec. 22 (4)—Jurisdiction to issue notice—Supplementary assessment—Fresh notice under Sec. 22 (4), Validity of.

Where an enquiry under Sec. 23 (3) of the Income-tax Act has commenced on a return submitted by the assessee, the Income-tax Officer has no power under Sec. 22 (4) to issue a notice for the production of the accounts of a business alleged by the Officer to be carried on by the assessee, but denied by the latter.

For the purposes of a supplementary assessment under Sec. 34, the Income-tax Officer can issue a fresh notice under Sec. 22 (4).

Cases [Civil Miscellaneous (Reference) Nos. 549 and 550 of 1926] stated under section 66 (3) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Punjab, for the opinion of the High Court.

CASE.

This case relates to the assessment for 1925-26 and to a supplementary assessment for 1924-25 made under section 23 read with section 34 of the Income-tax Act. Both assessments were made under sub-section (4) of section 23, as certain accounts, which the Income-tax Officer believed to exist, and which he called for under section 22 (4) were not produced. In both cases an appeal was filed under section 30, but in view of the proviso to sub-

* A.I.R. (1928) Lah. 219.

(1) 1 I.T.C. 266.

(2) 1 I.T.C. 416.

section (1) of section 30 neither appeal was entertained. Applications under section 33 and section 66 (2) followed and were rejected. The petitioners then applied to the High Court under section 66 (3) with the result that I have been called upon to refer the question for the opinion of the High Court as to "whether the Income-tax Officer legally proceeded to assess the petitioner under section 23 (4) and therefore no appeal lay to the Assistant Commissioner".

2. The petitioners are Commission Agents with admittedly three different businesses, two of which are carried on at Jullundur and one at Amritsar. Certain information received from an Income-tax Officer in Bombay followed by local enquiries led the Income-tax Officer, Jullundur, to believe that there was a fourth business being carried on at Jullundur under the name and style of Karam Chand Dina Nath. A notice was, therefore, issued to the petitioners under section 22 (4) to produce the accounts of this business. The petitioners' reply was to deny its existence. Considering, however, that there was sufficient evidence of its existence and believing that there were accounts connected with it, the Income-tax Officers concerned—the orders for 1924-25 and 1925-26 were passed by different Income-tax Officers—made the assessment under sub-section (4) of section 23 on the ground that the petitioners had failed to comply with the terms of the notices issued under section 22 (4). This is clearly apparent from the two orders in question which are dated the 14th July and the 23rd July 1925 respectively. So apparent, indeed, is it that when appeals were filed under section 30, they were rejected *in limine*. In acting thus, the Assistant Commissioner was, in my opinion, perfectly correct. The proviso to section 30 (1) explicitly states "that no appeal shall lie in respect of an assessment made under sub-section (4) of section 23", and it leaves an Assistant Commissioner no discretion in the matter. In such a case there is, I submit, only one question that he need examine, namely :—did the Income-tax Officer consider whether the assessee made one of the defaults specified in section 23 (4), and if so, did he decide the question in the affirmative? If it were evident from the Income-tax Officer's order that he had not done this, the order would *ipso facto* not be an order under section 23 (4) at all. In that case, the Assistant Commissioner would have power to entertain the appeal on its merits. In this case, however, the wording of both orders leaves no doubt that the two Income-tax Officers applied their minds to the question whether a default justifying assessment under section 23 (4) had been made or not. Having decided that there was default, they had no alternative under the Act but to make the assessment under section 23 (4). It does not follow, of course, that their decision was correct. To guard against possible error on this point, the Act provides a safeguard in section 27, which gives an assessee a further opportunity of satisfying the Income-tax Officer that "he was prevented by sufficient cause from complying" with the terms of a notice under section 22 (4). If he is unable to satisfy him, he has the further right of filing an appeal against his order, under section 30. This is the course that the petitioners should have followed, and had they done so, they would have been able to contest the grounds on which the Income-tax Officers acted.

3. I recommend, therefore, that the question which I have been directed to refer should be answered in the affirmative. I submit further that, as the petitioners did not take advantage of the remedy open to them under the Act, they are estopped from raising the question whether the Income-tax Officers had sufficient grounds for their belief.

M. C. Mahajan, for the assesseees.

D. C. Ralli, for the Crown.

JUDGMENT.

Civil Miscellaneous (Reference) No. 549 and Civil Miscellaneous (Reference) No. 550 of 1926 being connected will be disposed of together.

On a mandamus issued by this Court, the Income-tax Commissioner has referred the following question of law for decision, *viz.*, whether in the circumstances stated below the Income-tax Officer legally proceeded to assess the petitioners under section 23 (4) and therefore no appeal lay to the Assistant Commissioner.

The petitioners are commission agents, admittedly carrying on three different businesses in Jullunder and Amritsar. Certain information received from Bombay led the Income-tax Officer, Jullunder, to believe that there was a fourth business of this firm carried on at Jullundur under the name "Karam Chand Dina Nath". A notice under section 22 (4) of the Indian Income-tax Act was issued to the firm to produce accounts of this business, but the petitioners failed to do so and stated that no such business existed during the years for which the assessments in the two references were made, *viz.*, 1924-25 and 1925-26. The Income-tax Officer thereupon proceeded to make an assessment to the best of his judgment under section 23 (4) on the ground that the petitioners had failed to comply with the terms of the notices issued under section 22 (4). Appeals were filed but were rejected by the Assistant Commissioner on the ground that no appeal lay, the assessments being under section 23 (4).

Two points have been urged on behalf of the petitioners, *viz.*, (1) that the Income-tax Officer had no power to issue a notice under section 22 (4) when enquiry had already started under section 23 (3), and that the assessment should have been under section 23 (3) and not under section 23 (4); (2) secondly, that as the accounts of the business asked for did not exist, it cannot be said that there was any failure to comply with the terms of the notices issued under section 22 (4). The petitioners appeared and stated that the accounts called for did not exist and it was impossible for the petitioners to do anything more to comply with the terms of the notices issued under section 22 (4).

There is an important point of distinction between the facts of the two references which must be noted at the outset. The assessment for the year 1924-25 was a supplementary one under section 34 of the Income-tax Act, while that for the year 1925-26 was an original assessment under section 23 of that Act. For the purposes of the supplementary assessment, the Income-tax Officer had certainly power to issue a fresh notice under section 22 (4) read with section 34. As regards the assessment for the year 1925-26, it was not disputed on behalf of the respondent that the notice under section 22 (4) was issued during the course of an enquiry under section 23 (3), but it was contended that the powers conferred by section 22 (4) are very wide and it was open to the Income-tax Officer to issue a notice under that sub-section at any time during the course of the assessment. *N. D. Radha Kishan and Sons v. The Commissioner of Income-tax, Punjab* (1) was cited as an authority; but that ruling only deals with the question whether an Income-tax Officer can call for accounts of the branch of a firm situated in a Native State. No authority directly in point has been cited; but on a careful consideration of the provisions of sections 22 and 23, the contention of the applicants that a notice under section 22 (4) could not be issued after the commencement of an inquiry under section 23 (3) appears to us to be sound. Section 22 deals with "Return of Income", while section 23 deals with "Assessment". Under section 22, the Income-tax Officer is authorised to call for a "Return of

“income” and sub-section (4) gives him power to call for “such documents and accounts” as he may require. This is apparently intended to help the Income-tax Officer in deciding whether he will accept the Return or proceed to make an inquiry under section 23. If this were not so, there was no point in including the provision in a sub-section of section 22. If the power could be exercised at any time, the provisions might have been expected to be embodied in a separate section (*cf. e.g.* the provisions of section 37). The wording of sub-section (4) of section 23 also supports the same conclusion. That sub-section specifies three kinds of default, which authorise an Income-tax Officer to make a summary assessment, *viz.*, (1) failure to make a return under sub-section (1) or (2) of section 22; (2) failure to comply with the terms of a notice issued under sub-section (4) of section 22; and (3) failure to comply with all the terms of a notice issued under sub-section (2) of section 23 after “having made a return”. The words “having made a return” and the order in which the defaults are enumerated in section 23 (4) indicate that notice under section 22 (4) precedes the notice and inquiry under section 23. It is significant that sub-section (4) of section 23 does not authorise a summary assessment in the case of a default under section 23 (3). The natural inference is that the Legislature did not intend that when a man has submitted a Return, has complied with the terms of a notice (if any) issued under section 22 (4) at that stage, and has further complied with the terms of a notice issued under section 23 (2), he should be subjected for any subsequent default to the drastic penalty of a summary assessment—which carries with it the further penalty of the loss of right to appeal. If it were held that an Income-tax Officer could issue a notice under section 22 (4) even during the course of an enquiry under section 23 (3), it would be easy enough in many cases for the Income-tax Officer to convert which is really a default under section 23 (3) into a default under section 22 (4) and proceed to assess summarily.

The Income-tax Officer has, of course, wide powers to call for any account books or other documentary evidence he may require under section 23 (3) read with section 37. But he does not appear to be entitled to make a summary assessment for failure to produce accounts at this stage. It is true that the wording of section 22 (4) is somewhat wide, but it must be construed with reference to the context. It is also a well established rule of the interpretation of fiscal enactments that in case of doubt, an interpretation which is more favourable to the subject is to be preferred. On this principle also we think that the interpretation we have put on section 23 (4) is justified.

We accordingly hold that the Income-tax Officer did not act legally in issuing a notice under section 22 (4) for the purposes of the assessment for the year 1925-26, and the notice issued being invalid, default in complying with its terms did not justify a summary assessment under section 23 (4). As regards the supplementary assessment for 1924-25, the notice under section 22 (4) was valid as pointed out already.

The applicants have contended that even if the notice was valid, there was no “failure” to comply with it within the meaning of sub-section (4) of section 23 as the accounts books called for did not exist. But this contention involves a finding of fact. The orders of the Income-tax Officers show that they were fully satisfied after inquiry that business on an extensive scale was carried on under the name “Karam Chand Dina Nath” and that there was definite proof of the existence of accounts relating to that business, (*Vide* Exhibits A and B attached to the reference). In view of this clear finding on the point, we do not feel justified in allowing this question to be reopened.

We answer the question of law referred to us in the affirmative with respect to the supplementary assessment for the year 1924-25 and in the negative with respect to the assessment for the year 1925-26. Applicants will get half the costs.

[222] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Mr. Justice C. C. Ghose and Mr. Justice Buckland.

[22nd December, 1927.]

The Dibrugarh District Club, Ltd.

.. Assessee.*

v.

The Commissioner of Income-tax, Assam

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 4—Dibrugarh District Club, Ltd.,—Company running a club—Club consisting of shareholders and non-shareholders—Shares owned by non-members of the Club—Club profits distributed as dividend to shareholders—Company, if a mutual trading society—Profits of Company, assessability of.

The Dibrugarh District Club, Ltd., a limited company registered under the Indian Companies Act, had been conducting a club for the benefit of such persons as may become members, permanent or temporary. Under its articles, no shareholder was entitled to the benefits and privileges of the Club unless elected a member, the membership of the Club being distinct from and independent of the holding of a share. Of the members of the Club, only 69 were shareholders and 220 were non-shareholders, while 74 out of the 445 of the shares of the company were held by non-members of the Club. The profits of the Club were being distributed every year as dividend to the shareholders. On the claim of the Company to be exempt from assessment on its profits

Held, that the Company was assessable on the full amount of its profits, as it was not a mere mutual trading society making "quasi profits" by trading with its own members and returning such "profits" to its members.

New York Life Insurance Co. v. Styles, 14 App. Cas. 381, Distinguished.

Case stated under section 66 (2) of the Income-tax Act (XI of 1922), by the Commissioner of Income-tax, Assam, for the opinion of the High Court.

CASE.

I have the honour to forward herewith for favour of the opinion of the Honourable High Court under section 66 (2) of the Indian Income-tax Act, 1922, as required by the assessee, a question on a point of law regarding the liability to assessment to income-tax of the Dibrugarh District Club, Ltd.

The Dibrugarh District Club, Ltd., is a company registered under the Indian Companies Act, with a share capital of Rs. 50,000 divided into 500 shares of Rs. 100 each. It owns and carries on the business of a Club for European residents of the Lakhimpur District at Dibrugarh. Its shares are held partly by members of the Club and partly by non-members. The distinction between shareholders of the company and members of the Club is clearly recognised by Article 12 of the Articles of Association which runs as follows: "No shareholder as such shall be entitled to use the Company's Club premises, or enjoy the accommodation provided by the Company for the use of members of the Club, unless and until he has been duly elected as a member of the Club, or is exempt from ballot in accordance with the rules and regulations contained in the second schedule hereto which shall be read as part of these Articles." And the procedure for obtaining membership, as laid down in Rules 1 to 17 of the Rules, Regulations and Bye-laws of the Club, shows that the holding of a share is not a necessary qualification for membership; there is no limit also to the number of members (Rule 1). The Club states that it does no business with and makes no profits on dealings with non-members; and this is admitted as a fact for the purpose of this reference. The Club

* 32 C.W.N. 691.

profits are divided as dividends to shareholders, 8 per cent. and 12 per cent. having been paid of recent years. The Club in 1926 had 69 members who are shareholders, and 220 members who are not shareholders. The number of shares actually issued is 445, of which 74 are held by non-members.

The question is whether the full profits of the Dibrugarh District Club, Ltd. are liable to assessment to income-tax.

The Club argues that it is a mutual trading society making profits by trading with its members, which are returned to its members, and quotes the ruling of the Lahore High Court in the case of *The United Service Club of Simla* (1). It appears that the members of the United Service Club of Simla received no dividends from the profits, which were returned to members in the shape of increased benefits. In the present case we are dealing with two different sets of persons, one the proprietary body of shareholders which owns the property and divides the profits; the other the body of members of the Club, from whom the profit is derived. In the circumstances I am of opinion that the profits, which are paid to the shareholders and not returned to the members from whom they are derived, are liable to income-tax, and it is not a matter of importance that some of the shareholders and some of the Club members are the same people.

A. N. Bose, for the assesseees.

B. L. Mitter (Advocate-General), *H. R. Pankridge* and *S. M. Bose*, for the Crown.

JUDGMENT.

RANKIN, C. J.—The assessee in this case is the Dibrugarh District Club, Limited, which is a company limited by shares incorporated under the Indian Companies Act of 1882. I shall refer to it as "the Company" and I shall not refer to it as "the Club" for the reason that by the terms of its regulations the word "Club" is reserved for a different body. The main objects of the Company are to maintain and conduct a Club for the benefit of such persons as may become members of that club. The club's membership is unlimited in number and there are two classes of members, permanent and temporary. Save for certain persons who are by the rules of the club entitled to become permanent members without ballot or entrance fee, all permanent members are elected by ballot. The voters at such ballot are the existing body of permanent members of the club. The arrangement as to temporary members need not be set forth here. The general management of the club is vested in a Committee of seven members of whom at least five must be shareholders of the company and the directors of the company have an ultimate control in matters affecting the financial position of the company.

It will be seen therefore that membership of the club is quite a different thing from membership of the company which involves the ownership of a share or shares. Article 12 of the Company's articles of association provides that "No shareholder as such shall be entitled to use the company's club premises, or enjoy the accommodation provided by the company for the use of members of the club, unless and until he has been duly elected as a member of the club, or is exempt from ballot in accordance with the rules and regulations contained in the second schedule hereto which shall be read as part of these Articles." Conversely the rules of the club make it equally clear that persons may become members of the club without being shareholders in the company (Compare Rule 6).

Now it appears that in 1925-1926 the company made a profit of some ten thousand rupees. It did this clearly enough out of the various charges

made to members of the club but it could be wished that the Commissioner of Income-tax stated the facts as to this matter more explicitly (Whether the Articles of Association and the club's rules are logical and consistent on this point may be a question: apparently a member's subscription and the amount of his club bills are payable by him to the club: how and on what account the company becomes entitled to get money from the club or from a member is not clear).

The following facts are stated by the Commissioner of Income-tax as showing the position in 1926. The number of shareholders in the company is not given but the number of shares issued was 445 shares. Of these shares 74 are held by persons who are not members of the club, by how many of such persons is not stated.

The number of members of the club was apparently 289 of whom 220 were not shareholders of the company and 69 held shares.

It appears that in recent years the company has paid dividends out of its profits—8 and 12 per cent. has been declared and paid. By Article 104 it is provided that the dividend shall not exceed 12 per cent. on the issued capital—the balance of profit, if any, being intended for the Reserve, Depreciation and Sinking Funds

In these circumstances the company claims to escape payment of income-tax upon its profits and puts forward statements such as these—that the club does no business with and makes no profit on dealings with non-members; that the members of the club and shareholders are the same save in 13 instances and in these instances the shareholders were at one time members or relations of members.

These statements are confused and erroneous. The company dealt in 1926 with 220 members of the Club who were not shareholders, i.e., with 220 persons not members of the company. The company is not a mere mutual trading society making "quasi profit" by trading with its own members and returning such "profits" to the members. The case is wholly different on the material facts from *New York Life Insurance Company v. Styles* (1). I agree with the Commissioner in his view that in this case it is not a matter of importance that some of the shareholders and some of the Club members are the same people. I am further of opinion that in this case the fact of incorporation cannot be neglected and the Company (which is the assessee) is not to be confounded with the individual shareholders. In this case it is found that the assessee has made a profit and it must pay income-tax on the full amount thereof independently of what it proposes to do with that profit.

The assessee must pay the costs of this reference.

GHOSE, J. :—I agree.

BUCKLAND, J. :—I agree.

[223] IN THE HIGH COURT OF JUDICATURE AT CALCUTTA.

Before Sir George Rankin, Kt., Chief Justice, Mr. Justice Ghose and
Mr. Justice Buckland.

[22nd December, 1927.]

Vernon Milward Bason

v.

.. Assessee.*

The Commissioner of Income-tax, Bengal

.. Referring Officer.

Income-tax Act (XI of 1922), Sec. 4—Assessee holding shares in Companies—Dispute about rate of dividend ending in proceedings in Court—Compromise by payment of lump sum . profits for seven years—Sums paid, if assessable income in the year of receipt.

(1) L.R. 14 App. Cas. 381.

* 32 O.W.N. 574.

The assessee, a large shareholder in certain companies, objecting to a resolution passed on the 6th November 1917 distributing a dividend of 10 per cent. and allocating a third of the remaining profits for distribution among the working Directors of the Companies, instituted a suit contesting its legality. The suit was compromised in December 1924 by payment of Rs. 1,00,000 to him as representing the profits withheld from him during the seven years, 1917—1923. On an assessment of this sum in 1925—1926 as part of the assessee's total income in 1924-1925, the assessee claimed that the said sum should be treated as the income of the respective years, 1917-1923, when it would have been distributed to him as dividend but for the resolution of Nov. 1917 and the connected proceedings in Court.

On a reference to the High Court,

Held, that the said amount was the income of the assessee in the year of receipt and could not be regarded as profits of the previous years, since it was not due or payable to the assessee until the Company by its resolution in December 1924 authorised its payment to him as dividend.

Case stated under section 66 (2) of the Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Bengal, for the opinion of the High Court.

CASE.

In accordance with the provisions of section 66 (2) of the Income-tax Act XI of 1922, I have the honour to refer for the decision of the Honourable High Court certain questions of law which have arisen out of an order passed on the 7th July 1926 by the Assistant Commissioner of Income-tax, Headquarters, in an appeal preferred to him by Mr. Vernon Milward Bason against the assessment made on him for 1925-26.

2. The facts in this case are as follows :—The assessee Mr. Bason is a shareholder in 3 private limited Companies, *viz.*, (1) Messrs. Murray & Co., Ltd., Lucknow, (2) Messrs. Samuel Fitze & Co., Ltd., Calcutta, (3) Messrs. Devereux & Co., Ltd., Calcutta, and was never assessed in Bengal before the year 1925-26. Assessment proceedings were started on receipt of a letter by the Assistant Commissioner of Income-tax, Calcutta, from the Income-tax Officer, Lucknow, enquiring whether the assessee was assessed in Calcutta, and stating that from the books of Messrs. Murray & Co., Ltd., it was found that a sum of rupees one lakh was paid to him as accumulated dividends during 1924-25 and a sum of Rs. 1,097 on account of interest. Accordingly on the 21st December 1925, a notice was issued on him calling for a return of income under section 22 (2), which the assessee submitted on the 2nd February 1926. In this return he did not show the above sums reported by the Income-tax Officer, Lucknow, as having been received by him. He was, however, assessed on the 25th March 1926 under section 23 (4) on a total income of Rs. 1,32,110, including these sums, out of which Rs. 1,097 was assessed to income-tax and Rs. 82,110 to super-tax.

3. Subsequently Mr. Bason filed an application under section 27 before the Income-tax Officer, District II (2), Calcutta to reopen the assessment, and to give him an opportunity of placing all the facts before him. During the hearing of this application, he filed a copy of the Resolution of an extraordinary general meeting of Messrs. Samuel Fitze & Co., Ltd., held on the 16th December 1924, as the result of which he received one lakh of rupees, and contended that this sum represented portions of his income for the 7 years from 1917 to 1923 which had already paid both income-tax and super-tax and so were not assessable again. The Income-tax Officer then cancelled the section 23 (4) assessment and enquired from the Income-tax Officer, Lucknow, about the correctness of this statement. The latter replied that the payment of Rs. 1,00,000 to the assessee was out of the accumulated profits of the Company which had paid income-tax and super-tax in the hands of the Company and that it represented Directors' fees, which were not charged to the revenue account

by the Company, and which has not yet been shown by any of the Directors in their returns, as these were held in suspense by order of the court (The court referred to was the Calcutta High Court). On receipt of this report, the Income-tax Officer passed orders under section 23 (3) maintaining the original assessment, on the ground that the amount was a part of the income of the assessee in the year of receipt, viz., 1924-25 and as such liable to assessment in 1925-26.

4. On the 7th June 1926 the assessee filed an appeal under section 30 before the Assistant Commissioner of Income-tax, Head Quarters, objecting to the assessment. He stated that certain shareholders calling themselves Directors, with the object of appropriating more of the profits of the Companies than they were entitled to conspired together and passed an *ultra vires* Resolution on the 6th November 1917 calling certain irregular drawing "Directors' Bonus"; that he, who was a 1/6th proprietor of the business of the Companies and was entitled to 1/6th of the profits, then filed a suit in the Calcutta High Court, and by injunction held up 6 lakh of rupees of the profits of the Companies, that ultimately the suit was compromised, and the aforementioned Directors refunded to him one lakh of rupees, representing profits withheld from him for the 7 years from 1917 to 1923, and on which income-tax and super-tax were paid in each of those years. On the 7th July, 1926 the Assistant Commissioner rejected the appeal.

5. On the 17th July 1926 the assessee filed a petition under sections 33-66 (2) before me for review of the assessment, or in the alternative for a reference to the High Court of certain questions of law arising out of the assessment. On the 24th September 1926 I passed orders under section 33 declining to interfere in review, and asked the assessee to state the questions in a clearer form. On the 19th November 1926 two questions of law were filed which are as follows :—

(1) Whether under the circumstances of the present case the lakh of rupees could be said to be the income of the petitioner for 1924-25 as dividends or otherwise, and whether the whole or any portion of it is assessable under the Income-tax Act.

(2) Whether the liability to assessment attached to each of the Directors, as he received each year for several years his share of the bonus either by actual withdrawal or by credit to his private account with the companies, and whether this liability was in any way modified or in any way transferred to the petitioner by the subsequent payment to him of a lump sum on the 26th July 1924 (as recorded in the terms of settlement in the High Court suit of 1920). Accordingly I refer the two questions as stated by the assessee.

My opinion on these two questions is as follows :—

(i) In the petition under section 66 (2) the assessee says that the lakh of rupees represented the refund to the assessee of his share of profits misappropriated by the Directors. Even supposing that this sum represented accumulated Directors' fees or bonus, it is clear from the Income-tax Officer, Lucknow's letter No. A. R. 1023, dated the 6th May 1926, that these fees were not charged to Revenue Account by the Company. The payment was therefore out of the profits of the Company already taxed. As such it clearly is accumulated dividends previously withheld from him, and cannot be brought under any of the exemption mentioned in section 4 (3) of the Income-tax Act. It is therefore assessable income. Ordinarily a dividend earner like Mr. Basan either keeps accounts on the cash basis or keeps no accounts. In both cases the date of receipt of dividends determines the year of income for income-tax purposes. In this case Mr. Basan received the accumulated dividends in 1924-25

and as such the income was assessable in 1925-26. But even supposing that he kept his accounts on the mercantile system—which however, I do not admit—it would seem that the dividends accrued to Mr. Bason for the first time after the Extraordinary General Meeting of the shareholders on the 16th December 1924, when it was decided to pay him the lakh of rupees. Thus on an accrual basis also the lakh of rupees was part of Mr. Bason's income in 1924-25 and so assessable in 1925-26.

(ii) It is clear from the letter of the Income-tax Officer, Lucknow, referred to in the previous paragraph, that the amount out of which the lakh of rupees was paid to Mr. Bason was not shown by any of the other Directors in their returns of income. Thus there was no previous assessment of this money in the hands of any individual.

Liability to assessment is based on one's income. As the lakh of rupees had to be paid to Mr. Bason, it was clearly Mr. Bason's income and as such was liable to assessment in the hands of Mr. Bason. The argument in this second point of law appears to be that the other Directors ought to have been assessed during past years on the sums, out of which this lakh of rupees was subsequently paid to Mr. Bason. But, as already explained, no such assessments were actually made, as these sums were not included in their returns of income by the Directors, who evidently did not regard them as their incomes actually received. Even supposing that the Directors had been assessed on the said sums in past years, the fact would not have exempted Mr. Bason from liability to assessment in respect of the lakh of rupees, though the Directors might possibly have been in a position to claim relief in respect of over-payments of tax in past years. My conclusion, therefore, is that the question of modification or transfer of liability, as suggested, does not arise.

Proceedings of Extraordinary General Meeting of Samuel Fitze & Co., Ltd., held on 16th December 1924.

* * * * *

3. The Company with the consent of the Directors will pay Mr. Bason one lakh of rupees which shall be accepted by him upon the basis that it represents the share of the bonus claimed by him to 31st December 1923 which has been set aside for the Directors in terms of the resolution of 6th November 1917, which Mr. Bason has objected to and in respect of which these suits have been filed.

* * * * *

H. D. Bose, for the Assessee.

B. L. Mitter (Advocate-General), H. R. Pankridge and S. M. Bose, for the Crown.

JUDGMENT.

RANKIN, C. J.—In this case the assessee Mr. V. M. Bason, is a shareholder in three private companies limited by shares. In 1917 and after it would appear that these companies had some arrangement for pooling their profits. The three Companies were : Samuel Fitze and Company Limited, Murray and Company, Limited, and Devereux & Company, Limited.

On the 6th November 1917 a resolution was passed by the Directors of Samuel Fitze and Company, Limited, to the effect that after a dividend of not less than 10 per cent. had been paid out of the net pooled profits of the three Companies on any year's working, a sum equal to one-third of the balance remaining of the said net pooled profits should be applied to the distribution of a bonus between the working Directors in India. The assessee as a substantial shareholder in each of these three Companies objected to this

proposal and claimed that the resolution was *ultra vires* and illegal. It would appear that in the Companies' books entries were made on the basis of the resolution but the assessee having brought a suit and obtained an injunction, the special bonus proposed to be given to the working Directors out of the Companies' profits was not in fact handed over to the Directors. The sums in dispute appear to have been held in suspense by the Companies concerned pending a decision as to the validity of the resolution. In the end the matter was compromised as appears from a resolution passed at an Extraordinary General Meeting of the shareholders of Samuel Fitze and Company, Limited, held on the 16th December 1924 which shows that the bonus scheme was ultimately confirmed upon certain terms as regards the assessee of which the following is the chief. "The Company with the consent of the Directors will pay Mr. Bason one lakh of rupees which shall be accepted by him upon the basis that it represents the share of the bonus claimed by him to 31st December 1923 which has been set aside for the Directors in terms of the resolution of 6th November 1917 which Mr. Bason has objected to and in respect of which those suits have been filed."

The present question has reference to this payment of one lakh of rupees. As the Companies have in each year paid income-tax together with Companies' super-tax upon their profits the assessee has not been required by the assessment now in dispute to pay income-tax upon this figure. But this figure has been included in computing his total income under section 16 of the Income-tax Act of 1922 and he has been assessed to super-tax in respect of this total income.

The assessee's real grievance is that if the resolution of the 6th November 1917, which he regards as illegal, had not been passed and acted upon, he would in each of the years between 1917 and 1923 have received a larger dividend upon his share—a dividend upon which income-tax would not have been payable by him and which would not have been in amount sufficient in any year to expose him to super-tax.

The Commissioner of Income-tax has stated for the opinion of the Court two questions, namely :—

"(1) Whether under the circumstances of the present case the lakh of rupees could be said to be the income of the petitioner for 1924-25 as dividends or otherwise, and whether the whole or any portion of it is assessable under the Income-tax Act.

(2) Whether the liability to assessment attached to each of the Directors, as he received each year for several years his share of the bonus either by actual withdrawal or by credit to his private account with the Companies, and whether this liability was in any way modified or in any way transferred to the petitioner by the subsequent payment to him of a lump sum on the 26th July 1924 (as recorded in the terms of settlement in the High Court suit of 1920)".

The only question which really requires to be answered is the first. The Commissioner of Income-tax has in my opinion correctly held that the sum in question was income assessable in 1925-26. No part of this sum was due or payable to the assessee until the Companies declared it as dividend or otherwise dealt with it by making a payment thereof to Mr. Bason and the amount was part of his income in the year of receipt. It cannot be regarded, as the assessee has claimed, as representing the assessee's profits for previous years.

The second question stated to us, as framed by the assessee, appears to be altogether misconceived. The directors in fact did not receive this money and it never was taxed or taxable in their hands. The claim to assess the assessee upon this sum does not in any way rest upon any theory that the Directors' liability to income-tax has been transferred to the assessee. The Commissioner of Income-tax has rightly held that the correct answer to this question is that it does not arise.

In my opinion the assessment is in order; the questions referred to us should be answered in the sense which I have indicated and the assessee should pay the costs of this reference.

GHOSE, J.—I agree.

BUCKLAND, J.—I agree.

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